

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LISA MENNINGER,

Plaintiff,

v.

PPD DEVELOPMENT, L.P.,

Defendant.

Civil Action No.
1:19-cv-11441-LTS

BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL
Day 9

Thursday, March 30, 2023
8:59 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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Official Court Reporter
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P R O C E E D I N G S

(In open court at 8:59 a.m.)

THE COURT: Ready to go?

MR. HANNON: Two quick things?

THE COURT: Yeah.

MR. HANNON: When we rest, Your Honor, we have a number of joint exhibits, as you know. We've been showing some to the jury as we go. Ms. Belmont has kind of kept track of those. I'd like all of the joint exhibits in evidence. I'm not sure if I need to formally move for that.

THE COURT: I think it's fine if you want to say before you rest, that all of -- I will -- I think I said to the jury at the beginning that the joint exhibits sort of all are automatically in when you bring them up. But I'll say that the all -- well, you can just say we'd like to move all of the joint exhibits into evidence, and then I'll say that and I'll say to the jury the ones you've already referred to, they're already in evidence. These are other ones that are all in evidence. You'll have them all in the jury room.

MR. HANNON: Okay. And then there may be some duplicates that we're going to work to try to take some junk out.

THE COURT: Sure.

MR. HANNON: So we've talked to Ms. Belmont about that, and so we'll address that prior to --

1 THE COURT: I don't think I need to tell the jury
2 about them, but I think that makes sense to take out
3 duplicates.

4 MR. HANNON: And then secondarily, this may require
5 more time than we have, there's an issue regarding the
6 collateral source doctrine which applies to Mr. Jonas's
7 testimony; specifically, the disability benefits that
8 Dr. Menninger receives and whether or not that counts as
9 mitigation.

10 We suggest in our jury instruction that the jury
11 decide whether or not to apply those as mitigation. The
12 Court hasn't included those. And I'm just wondering if the
13 Court has already decided the position regarding collateral
14 source, if that's a --

15 THE COURT: Your position is that -- there's no
16 dispute factually that she receives those benefits?

17 MR. HANNON: Correct.

18 THE COURT: And the question is whether -- your
19 position is what?

20 MR. HANNON: Our position is that there's a sort of
21 threshold determination of whether or not to count those as
22 mitigation, essentially, to deduct that in determining her
23 harm.

24 THE COURT: As the jury has a -- the right to
25 either -- let's say the jury, just to make it simple, came up

1 with a hundred dollars as harm, and her collateral benefits
2 were \$12.

3 MR. HANNON: Right.

4 THE COURT: That the jury could make a -- they
5 could just say \$100 in harm and ignore the 12, or they could
6 say we would like -- we view it as mitigation and therefore,
7 we're at \$88?

8 MR. HANNON: Correct. And I think there's a fair
9 question whether that's a jury question or a question for the
10 Court. So I -- I think the right answer is the jury decides,
11 but -- but anyhow, I just flag it because if Your Honor had
12 already made a determination on that, we can leave some stuff
13 out of the direct, but it sounds like the Court has not made
14 a determination on that, so it sounds like we should put
15 everything in now, and we'll address this --

16 THE COURT: I think that makes sense. Do you have
17 a view on this?

18 MR. CURRAN: We think that that makes sense. We
19 can address it later.

20 THE COURT: Okay. Fine. Let's go get the jury.
21 (Jury present.)

22 THE COURT: Good morning, ladies and gentlemen. No
23 one discussed the case, no one did any independent research?
24 Good.

25 All right. Mr. Hannon, call your next witness.

1 MR. HANNON: The plaintiff calls Bruce Jonas.

2 THE DEPUTY CLERK: If you could raise your right
3 hand.

4 (Witness duly sworn.)

5 THE DEPUTY CLERK: Can you please state your full
6 name and spell your last name for the record.

7 THE WITNESS: Bruce Robert Jonas, J-o-n-a-s.

8 MR. HANNON: May I proceed, Your Honor?

9 THE COURT: Yes.

10 **BRUCE R. JONAS**

11 having been duly sworn, testified as follows:

12 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

13 BY MR. HANNON:

14 **Q.** Good morning, Mr. Jonas.

15 **A.** Good morning.

16 **Q.** Could you please explain to the jury what you do for
17 work?

18 **A.** I'm a CPA, and for the last 30 years, I've been doing
19 damage calculations for litigation matters, working with
20 attorneys.

21 **Q.** Okay. Were you retained by my firm in connection with
22 this matter to do an economic damage calculation?

23 **A.** Yes, I was.

24 **Q.** Okay. Before talking about that, I wanted to talk a
25 little bit about your background. Could you describe your

1 educational background for the jury, please.

2 **A.** I graduated from Hofstra University in 1969 with a BBA in
3 accounting. That was the extent of my formal education. I
4 did get my CPA certificate in the State of New York in 1972.
5 I went to work immediately for Peat Marwick Mitchell, which
6 is the predecessor of KPMG, one of the four big accounting
7 firms. It was eight when I started.

8 And I -- at Peat Markwick, I was an auditor and I
9 was a consultant, and at that point, I started doing
10 litigation work about 1978.

11 **Q.** Okay. And after you started doing litigation work, would
12 that be sort of doing analysis in support of litigation
13 matters?

14 **A.** That's correct.

15 **Q.** Okay. And did you continue to focus on that area going
16 forward?

17 **A.** To the -- as much as I could control it, yes, I did.

18 **Q.** Okay. And at some point in time, did you start your own
19 firm?

20 **A.** In 1991, I formed Jonas & Welsch with Donald Welsch, who
21 had been an associate of mine at Peat Marwick.

22 **Q.** And for -- what did you do at Jonas & Welsch?

23 **A.** Again, we did exclusively litigation support work. Our
24 practice was pretty evenly split, revenue-wise, between
25 matters involving individuals, things like that wrongful

1 death, personal injury, and labor matters; and the other side
2 was commercial, breach of contract, thing like that.

3 **Q.** Okay. Any particular split between representing or
4 working on behalf of plaintiffs versus defendants?

5 **A.** No. We worked for either side.

6 **Q.** Okay. And in terms of the type of litigation support
7 matters, you mentioned about half -- half of the work,
8 revenue-wise, was personal; is that right?

9 **A.** The three items I talked about, personal injury, wrongful
10 death, and labor.

11 **Q.** And in those three areas, what kinds of litigation
12 support work did you do?

13 **A.** Well, in the personal injury, wrongful death, and labor,
14 you're looking at a situation in which someone has allegedly
15 been harmed by someone else. If the trier of fact were to
16 find that there was a wrongdoing which occurred, you're
17 trying to calculate what the losses were to the plaintiff,
18 what would they have earned had there been no wrongdoing,
19 versus what they can earn now, the difference being the
20 damages.

21 **Q.** Okay. And do you have any sense of how many of those
22 types of damage calculations you've done over the years?

23 **A.** Thousands.

24 **Q.** In connection with doing that damage calculation, did you
25 do any work with respect to the 9/11 Victims Fund?

1 **A.** We did a tremendous amount of work with the VCF and Ken
2 Feinberg in the original victims compensation fund. Ken
3 built the rules of the calculation around case law, which we
4 were very familiar with, because we had been doing that kind
5 of work. And there were a number of times when he called us
6 in to help clarify some things and get it done the way he
7 wanted to do it.

8 **Q.** Okay. And you mentioned you started Jonas & Welsch in
9 1991. What's the -- what's the status of Jonas & Welsch
10 today?

11 **A.** At 12/31/2020, we kind of closed our doors. My partner,
12 who is a few years older than I am, was having some medical
13 issues, and could not take the witness stand anymore. So we
14 felt it was time to close the doors. We contacted our
15 clients, told them that we would finish any work that was
16 in-house, but we weren't starting anything new.

17 **Q.** And at that point in time, was this one of the projects
18 that was already started?

19 **A.** Yes, that's correct.

20 **Q.** Okay.

21 **A.** I believe we wrote our report in October of 2020.

22 **Q.** Okay. And you expect this is probably the last time
23 you'll be testifying?

24 **A.** This could be the last time.

25 **Q.** Okay. All right. Can you describe for the jury, just as

1 a general overview, how it is that you go about doing a
2 damages calculation?

3 **A.** Well, as I said, the objective is to try and figure out
4 what was lost, what would have been earned had there been no
5 wrongdoing versus what can now be earned in a harmed
6 situation, and the difference is damages.

7 It's really not rocket science. There's a lot of
8 calculations, but there's not a lot of subjectivity in it.
9 You try and get an understanding of what the case is, the
10 fact patterns, amass as much data as is pertinent to that
11 case and pertinent to the calculations, and build a worksheet
12 and do the -- grind through the numbers.

13 **Q.** Is this an exact science?

14 **A.** No. There's -- for example, in a case like this where
15 we're projecting forward, we don't have a crystal ball, so I
16 can't tell you exactly what's going to happen in 10 or
17 15 years from now. But you try and build your calculations
18 and your estimates based on the historical patterns that have
19 existed, and that's the best information we have at the time
20 we're doing those calculations.

21 **Q.** Very good.

22 And in the course of your -- doing your work in
23 this case, did you create some tables reflecting your
24 calculations?

25 **A.** Lots of tables.

1 **Q.** Okay. I'm now going to show you Joint Exhibit 455. And
2 is this one of the tables that you created based upon your
3 analysis in this case?

4 **A.** Yes. This accompanied my written report, the narrative,
5 and this was the exhibit that identifies -- excuse me -- what
6 the damages would be between 2018 and 2036 by each year.

7 **Q.** Okay. And we'll go through some of this in more detail,
8 but just to orient the jury a little bit, in calculating the
9 economic damages, did you take into account the value of any
10 stock options or equity that Dr. Menninger had?

11 **A.** No. You specifically indicated to me that that was not
12 part of my responsibility.

13 **Q.** Okay. Understood.

14 And then looking over here on the right side of the
15 table, you'll see here there's this fax reflecting this
16 was -- this was faxed yesterday. Is that because you
17 identified an error in this table when you were preparing to
18 testify?

19 **A.** Yes. That last column that says "NPV," which stands for
20 net present value, the bottom number, which is the number
21 that we've concluded is the damage amount for the entire
22 period, that number is correct. The intermediate numbers
23 were slightly off because we had one year in the past which
24 should have been in the future, which moved at discounting
25 very, very slightly.

1 **Q.** Okay. And just for the jury's reference, when you create
2 these tables, are these essentially Excel worksheets?

3 **A.** Yes, they are.

4 **Q.** So are there, you know, formulas imbedded in all these
5 various columns we see?

6 **A.** Yes, there are.

7 **Q.** Okay. All right. So let's dive in here and look here at
8 the -- one of the first columns. So the first column here we
9 have is age. And am I right that part of the work in doing a
10 calculation like this is trying to determine an individual's
11 expected work life?

12 **A.** That's correct. That's a critical part of the whole
13 calculation.

14 **Q.** And --

15 **A.** What you're trying to do, again, is what was lost because
16 of the alleged wrongdoing and for how long it was lost.

17 **Q.** Sure. And can you explain to the jury what -- what we
18 mean by "expected work life"?

19 **A.** The technical definition is the point in time when an
20 individual voluntarily withdraws from the work force, what we
21 would call retirement. I'm in that phase right now trying to
22 retire.

23 And there are tables that are prepared. There's a
24 lot of science that goes into this, and we use recognized
25 authorities on calculating work life expectancy. There are a

1 number of variables in that calculation, which is the current
2 age of the person, the gender of the person, and the highest
3 level of education, the top being a professional degree.

4 **Q.** And when you look at those tables, is that, in part,
5 based upon what the current age of the individual is?

6 **A.** Well, we've -- what we always do is we use the age at the
7 point of wrongdoing, so this was back in 2018.

8 **Q.** Okay. And the tables and materials that you've
9 referenced that you used in determining expected work life,
10 are -- to your knowledge, are those regularly relied upon by
11 experts in your field?

12 **A.** Yes, sir, very frequently. And they became the basis for
13 work life expectancy in the victims compensation fund.

14 **Q.** Okay. Looking here at wages and bonus, can you just tell
15 the jury what's -- what the components of that calculation
16 are?

17 **A.** Wages and bonus. We had to calculate what the calendar
18 year 2018 was, recognizing that there is a kick-up in salary
19 in April. So we took information from compensation documents
20 provided by the defendant, took three months of one year,
21 nine months of the other year, and calculated what the
22 initial wages would be for the calendar year.

23 Then using a analysis of past performance, past
24 wages, we calculated what a growth rate was from one year
25 over the next, and that came out to 2.7 percent. So we took

1 the 2018 wages and rolled them forward, adding 2.7 a year to
2 the wages.

3 **Q.** Okay. Just unpack that a little bit here. So I think
4 you indicated that the first step was figuring out this 2018
5 number; is that right?

6 **A.** That's correct.

7 **Q.** Okay. And I'm going to show you another document here.
8 This is going to be Joint Exhibit Number 14. And you see
9 here this would be Dr. Menninger's 2018 compensation
10 statement. Do you see that there?

11 **A.** I do.

12 **Q.** Okay. And it includes a line showing what her salary was
13 going to be effective April 1, 2018?

14 **A.** Correct.

15 **Q.** Okay. And so did I hear you right that, because the --
16 because the pay increase went into effect April 1st, that
17 you -- you took that into account in figuring out what the --

18 **A.** Three months of the old and nine months of the new.

19 **Q.** Okay. And then you included the bonus that would be paid
20 in 2018; is that right?

21 **A.** Correct.

22 **Q.** Okay. In determining the 2018 wage and bonus number, did
23 you make a reduction, going back to Exhibit 454 here, based
24 upon -- sorry -- that's the wrong button. Here we are.

25 Did you make a reduction based upon labor force

1 participation?

2 **A.** Yes. Let me explain what labor force participation is.
3 I mentioned earlier that the tables that we use for work life
4 identify the point in time when an individual -- excuse me --
5 would voluntarily withdraw from the work force.

6 And it's recognized amongst economists that,
7 between now and then, there are likely going to be times when
8 you are not employed, either voluntarily or involuntarily.
9 Your spouse gets a great job on the other side of the
10 country, and you have to leave and take off with that spouse,
11 and you're now out of work for three or four months.

12 We don't know when that -- that absence from the
13 work force is going to take place, but there -- again, there
14 are a lot of tools that the economists use to identify what
15 that amount is, the percent is, and we take that percent --
16 in this case, it was 3.24 percent, I believe -- out of each
17 year, because we don't know if it's going to happen in the
18 third year or the fifth year or not at all. But we reduce
19 each year by that labor force adjustment.

20 **Q.** Okay. And then in terms of projecting the years going
21 forward -- so, for example, going from what you calculated
22 for 2018 going forward to 2019 -- can you walk the jury
23 through how you did that computation?

24 **A.** Sure. The -- once we've established what the wages would
25 be for 2018 and we know what the historical growth rate was

1 year over year in wages, which was 2.7 percent, we grow the
2 wages each year by 2.7 percent.

3 The bonus is a percentage of the wages, so, again,
4 we took the historical performance of bonuses and applied
5 that to the wages to come up with the total wages and bonus.

6 **Q.** Okay. So to just unpack that a little bit, you indicated
7 that you determine the annual growth rate for salary would be
8 2.7 percent? Did I hear that right?

9 **A.** That's correct.

10 **Q.** And when you say that was "historic," what do you mean
11 that was historic?

12 **A.** In the years that Dr. Menninger was working for PPD, this
13 was year over year her wage growth.

14 **Q.** Okay. In your experience, is a calculation of
15 2.7 percent year over year wage growth, is that reasonable?

16 **A.** It is reasonable, yes.

17 **Q.** Okay.

18 **A.** Again, going back to the victims compensation fund where
19 they use a whole different methodology to calculate growth,
20 they level out at age 55 at 3 percent. So people who are 55
21 and older would recognize a 3 percent growth, so 2.7 is
22 certainly reasonable.

23 **Q.** Okay. And then you mentioned bonus, and I think I heard
24 you say that the bonus was a percentage of the salary; is
25 that right?

1 **A.** The prior year salary, correct.

2 **Q.** Okay. And how did you determine what that -- what that
3 percentage would be?

4 **A.** The same way. We looked at the bonuses that were given.
5 We compared them to the base salaries and concluded that the
6 bonus was just under 20 percent of the salary.

7 **Q.** Okay. And did you review Dr. Menninger's offer letter in
8 connection with your work, as well?

9 **A.** Yes, I did. We read it. And I think it indicated that
10 the target bonus was about 21 percent.

11 **Q.** Okay. So given the fact that Dr. Menninger's target
12 bonus was 21 percent, did you believe that using a target --
13 I'm sorry -- assuming a 20 percent bonus going forward was
14 reasonable?

15 **A.** Yes, correct.

16 **Q.** And then looking back here at your chart, so as these
17 numbers sort of grow year over year, is that -- is that based
18 upon those -- those same calculations you just described?

19 **A.** Right. It's principally the growth of 2.7 percent in the
20 salary, and then the corresponding growth of the bonus, which
21 is getting the 20 percent of that 2.7 bump each year.

22 **Q.** What happens here in 2036?

23 **A.** She turns 67.41 years, and that's the point in time that
24 we determined she would be withdrawing from the work force,
25 retiring, so it's only a partial year.

1 **Q.** Okay. All right. Let's look at the next column here.
2 You have benefits. Can you explain to the jury what -- what
3 the benefits here consist of?

4 **A.** There are three components of benefits. There's the
5 401(k), there's healthcare benefits, and there's the
6 employer-paid portion of Social Security.

7 **Q.** Let's take the first one last. Why do you consider
8 Social Security to be a benefit?

9 **A.** Well, the employer is putting money into the
10 individual's, quote, account, which they will benefit from
11 when they retire. Their benefits will be greater and there
12 is a cost to that greater benefit and we consider that a
13 benefit to be considered.

14 **Q.** And is that benefit something that employers are required
15 by law to provide?

16 **A.** Sure.

17 **Q.** And in terms of calculating the amount of that Social
18 Security benefit, how did you do that?

19 **A.** Well, we know what the percentage is, the employer
20 percentage. We also know at the top what the maximum being
21 paid in Social Security is each year. Over the past number
22 of years, we've calculated what the growth is in that base
23 number.

24 In other words, you're not paying Social Security
25 above a certain compensation amount. We did that calculation

1 and we made sure that the amount of employer-paid Social
2 Security did not exceed the basis of the salary component.

3 **Q.** Okay. And then you mentioned healthcare. How did you go
4 about determining the healthcare benefit value?

5 **A.** There is a tool that we use called "expectancy data."
6 It's regularly used by economists, especially forensic
7 economists. And it compiles data from the United States
8 government which aggregates it in an hourly cost for a
9 particular type of benefit.

10 We can't measure the benefit that Dr. Menninger
11 would receive from that healthcare because I don't know if
12 she's going to be sick. I don't know if she's going to be
13 hit by a truck. I don't know if she's ever going to use
14 those benefits. But I can measure the cost, and the tables
15 that the expectancy data provide are based on the type of
16 employment. In this case, we use the table that was private
17 companies and in the category of professional and technical
18 services.

19 **Q.** And is that methodology that you use, is that regularly
20 relied upon by experts in your field?

21 **A.** Yes, it is.

22 **Q.** Okay. And then you mentioned 401(k). Can you explain
23 for the jury what the -- what the 401(k) benefit is?

24 **A.** Yes. We saw in the handbook that there's a 401(k)
25 benefit. If I remember correctly, it's half of what the

1 employee puts in, up to a maximum of 3 percent, half of the
2 6 percent that the employee puts in. And we noticed that
3 Dr. Menninger was, in fact, putting in the maximum, so we
4 took that 3 percent and added it to the benefits.

5 **Q.** Okay. And was that 3 percent of the base salary?

6 **A.** Yes. Excuse me. Yes.

7 **Q.** And here's a real tough one. The total column?

8 **A.** Yeah, well, that's a calculator, column A plus column B
9 equals column C.

10 **Q.** Good. Okay.

11 Next section here is -- oops. I did it again. I'm
12 sorry.

13 All right. We're back on 454. The next column
14 here, we have "actual/mitigation." Can you explain for the
15 jury what this represents?

16 **A.** Well, we started in 2018, and our calculation would
17 compute the entire amount of 2018, but we have to subtract
18 out what she actually earned during that year. And the
19 285,000 we got from a W-2 that she received from PPD.

20 **Q.** Okay. And just sort of more -- more sort of generally,
21 when you're doing a damage calculation, is part of what you
22 look at the anticipated earnings of the individual moving
23 forward?

24 **A.** Could you repeat that question?

25 **Q.** Yeah, that was a tough question. Why does -- why in

1 doing a damage calculation did you -- do you look at the
2 actual/mitigation?

3 **A.** It's the best evidence of what she actually received.

4 **Q.** Okay.

5 **A.** I don't know, as I sit here today, exactly what was --
6 that 285, what made it up, but that's what she got.

7 **Q.** Okay. And in doing your analysis, did we ask you to do
8 two separate calculations relative to mitigation?

9 **A.** Yes, you did.

10 **Q.** Okay. And let me show you another document here. So I'm
11 now showing you Exhibit 455. And so is this the other
12 calculation you did?

13 **A.** Yes, it is.

14 **Q.** Okay. And am I right that, with respect to the last
15 exhibit we looked at, these columns concerning the expected,
16 that should all be the same, right?

17 **A.** Those should be identical --

18 **Q.** Okay.

19 **A.** -- with Exhibit A.

20 **Q.** Okay. And here in the actual mitigation, this is
21 different, right?

22 **A.** From 2019, down, it's different.

23 **Q.** Okay. And is that because in this calculation, you
24 included certain -- certain benefits that Dr. Menninger
25 received?

1 **A.** Yes. Yes, in 2019, she received 85,000 from Unum, which
2 I understand to be a disability insurer, perhaps; and
3 thereafter, the 29.9 is the Social Security disability that
4 she would get because she's disabled.

5 **Q.** Okay. And am I right that in conducting both analyses,
6 you were asked to make the assumption that Dr. Menninger
7 continues to receive disability and does not return to work?

8 **A.** That's correct, for the remainder of her expected work
9 life.

10 **Q.** And just so we're complete here, can you tell the jury
11 what happens here in 2036?

12 **A.** Well, in 2035, I believe she hits 67; and the disability
13 becomes retirement Social Security, and you wouldn't get
14 both. So we've terminated the disability in 2035, and there
15 would be none in 2036.

16 **Q.** Okay. I'm going to take you back to Exhibit 454 here for
17 a moment. And just looking here at the top line, so you told
18 us this -- the wage and bonus number, that was taken from
19 Dr. Menninger's tax records; is that right?

20 **A.** The W-2, correct.

21 **Q.** Okay. And with respect to the benefits number here, we
22 see that on your chart here you have the expected benefits
23 being less than the actual benefits; is that right?

24 **A.** That's correct.

25 **Q.** Okay. And am I right that, when you were doing this, you

1 assumed that Dr. Menninger had lost her company sponsored
2 health insurance during 2018?

3 **A.** That's correct.

4 **Q.** Okay. And if the facts were to show to this jury that
5 she actually kept her health insurance throughout 2018, would
6 that -- would that mean that your numbers are off by --

7 **A.** \$3,944.

8 **Q.** So that amount right there?

9 **A.** The -- yes.

10 **Q.** Okay. All right. Now let's look here at the losses
11 column. So is this just simple math here?

12 **A.** Correct. It's subtracting the middle columns from the --
13 the first columns.

14 **Q.** Okay. And we see here on 454, since you're not including
15 the disability payments going forward, that the losses aren't
16 being reduced from 2019 forward, right?

17 **A.** Correct.

18 **Q.** And if we look at the other exhibit you did, 455, this
19 shows the jury what the math would be if you took those into
20 account?

21 **A.** Yes, sir.

22 **Q.** Okay. Back to 454, here in the last two columns, we have
23 nominal and NPV. Do you see that?

24 **A.** I do.

25 **Q.** And can you explain to the jury why -- why we have those

1 columns?

2 **A.** The nominal column is the cumulative year over year. So
3 in -- we add 2026 losses to the cumulative amount
4 through 2025 to come up with that nominal amount. The total
5 amount would have been 7,447,000.

6 **Q.** Okay. So that would have been the total if you just --
7 if you just -- just added up the numbers, right?

8 **A.** If you just add up the numbers.

9 **Q.** All right. Why -- why do we have, then, this column here
10 for NPV?

11 **A.** NPV is the net present value and it works off of the
12 theory that a dollar today is worth more than a dollar
13 tomorrow.

14 We see it most frequently when you go buy a lottery
15 ticket. You can buy a lottery ticket that's going to pay a
16 hundred million dollars. If you take it over 20 years,
17 you'll get the hundred million dollars; but if you take it
18 all today, you -- excuse me -- you may only get \$78 million
19 because the dollar today is worth more than it would be
20 spread over time.

21 Theoretically, you could take that 78 million and
22 invest it; and after 20 years, you would have 100 million.

23 **Q.** Okay. So in performing damage calculations, is it
24 typically for experts in your field to take into account the
25 net present value of the future income streams?

1 **A.** Yeah. If you want the true economic loss, you would have
2 to go through this net present value calculation.

3 **Q.** Okay. And just broadly speaking, how do you determine
4 net present value?

5 **A.** I use the Excel spreadsheet formula. A lot of us can go
6 back to our college days and find these enormous tables in
7 the back of textbooks, but Microsoft has put those into an
8 Excel spreadsheet, so I can put the formula in and it will
9 calculate the net present value.

10 **Q.** Okay. Now, in calculating the net present value here,
11 you have -- you have discounted, for example, Dr. Menninger's
12 anticipated earnings in 2021. Do you see that?

13 **A.** Yes.

14 **Q.** And why did you do that?

15 **A.** 2021 is -- I don't know if you've got it lined up right.

16 **Q.** I don't. I did a bad job highlighting that.

17 **A.** Okay. Through -- since we did our report in 2020, the
18 damages in '18, '19, and '20 would have been considered in
19 the past. Any damages after 2020 would be considered in the
20 future and -- excuse me -- if it's the future, that's the
21 piece that has to be discounted. You're not discounting the
22 past.

23 **Q.** So if you were doing this calculation --

24 **A.** Excuse me.

25 **Q.** -- as of today, for example, in order to determine

1 Dr. Menninger's damages through 2022, would you -- would you
2 apply discounting?

3 **A.** No, I would not.

4 **Q.** Okay.

5 **A.** But my discounting would start at 2023 instead of 2021.

6 **Q.** Okay. Good.

7 MR. HANNON: That's all I have, Your Honor.

8 THE COURT: Okay. Cross-examination.

9 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

10 BY MR. CURRAN:

11 **Q.** Good morning, Mr. Jonas. Sorry. I'm just getting set up
12 over here.

13 **A.** Take your time.

14 **Q.** So, Mr. Jonas, my name is Patrick Curran. I'm one of the
15 attorneys for PPD.

16 MR. CURRAN: Oh. May I approach the witness,
17 Your Honor?

18 THE COURT: You may.

19 MR. CURRAN: Thank you.

20 Here you go, sir.

21 And, Your Honor, I think you already have --

22 THE COURT: I do.

23 BY MR. CURRAN:

24 **Q.** So, Mr. Jonas, I think you testified that you were
25 retained by Dr. Menninger's attorney to provide your opinion

1 in this case; is that right?

2 **A.** That's correct.

3 **Q.** And you're being paid by Dr. Menninger's counsel to
4 provide your testimony today, correct?

5 **A.** That's correct.

6 **Q.** I understand -- let's -- from your expert report, like,
7 your offices are in New York and New Jersey; is that right?

8 **A.** Well, there's only three of us in the company. I'm in
9 Long Island, Don Welsch, who is in New Jersey, and then the
10 young lady that does a lot of our work is a CPA in
11 North Carolina.

12 **Q.** Okay. So it's fair to say you had to travel up here to
13 testify today?

14 **A.** I traveled up yesterday, but yes.

15 **Q.** Oh, okay. That makes sense. And who paid for your
16 travel expenses?

17 **A.** Nobody yet. I expect to bill them.

18 **Q.** Okay. So you expect to be reimbursed?

19 **A.** Yes.

20 **Q.** Okay. Now, in forming your opinion about the amount of
21 Dr. Menninger's damages in this case, you made a number of
22 assumptions; is that right?

23 **A.** Either I made them or they were given to me.

24 **Q.** Okay. So one of those assumptions was that Dr. Menninger
25 will be able to work -- won't be able to work for the

1 remainder of her working life?

2 **A.** That's correct.

3 **Q.** Is that one of the assumptions you made because
4 Dr. Menninger's counsel asked you to?

5 **A.** That's correct. I think it's a little broader than won't
6 be able to work. It's won't be able to work in a comparable
7 field.

8 **Q.** Okay. So it's not that she won't be able to work at all;
9 the assumption is she won't be able to work in a comparable
10 field?

11 **A.** Right.

12 **Q.** So if she were able to work at all, would that affect
13 these numbers?

14 **A.** I think that's a legal question, whether the duty to
15 mitigate -- if she flips hamburgers, would that be considered
16 mitigation for her job.

17 **Q.** Well, putting aside whether she has a duty to flip
18 hamburgers, if she gets a job flipping hamburgers and makes
19 money doing it, would that reduce the numbers in your report?

20 **A.** I guess it could.

21 **Q.** And you said you traveled up here yesterday, right?

22 **A.** Correct.

23 **Q.** So you obviously weren't in court on Monday?

24 **A.** No.

25 **Q.** All right. So were you made aware that Dr. Menninger's

1 medical expert testified on Monday testified that he can't
2 say for certain that Dr. Menninger won't be able to work
3 again for the rest of her working life and that it's possible
4 she may be able to work again?

5 **A.** I'm unaware of any of that testimony.

6 **Q.** All right. And to be clear, you're not offering an
7 opinion today as to whether Dr. Menninger can or cannot work
8 today or --

9 **A.** Clearly I'm not.

10 **Q.** Okay. All right. I want to show you one of the
11 documents that Mr. Hannon was showing you. And this is
12 Exhibit 455, and it's Exhibit B from your expert report, but
13 it's been admitted here as Joint Exhibit 455.

14 And Dr. Hannon [*sic*] went through the other version
15 of this one --

16 THE COURT: Mr. Hannon.

17 MR. CURRAN: Mr. Hannon.

18 MR. HANNON: I've been called worse things,
19 Your Honor.

20 MR. CURRAN: There is so many doctors in this case.
21 Sorry. I keep getting -- getting mixed up. So --

22 THE COURT: Some people might think it's a
23 compliment for a lawyer to be called doctor.

24 MR. CURRAN: Definitely.

25 BY MR. CURRAN:

1 **Q.** So this was your calculation of the salary, bonus, and
2 benefit losses by Dr. Menninger on an annual basis starting
3 in 2018; is that right?

4 **A.** That's correct.

5 MR. HANNON: I'm sorry. This one isn't on our
6 screen.

7 THE COURT: It's not on your screens?
8 You have it.

9 You don't have it?

10 MS. MANDEL: We don't have it over here.

11 MR. HANNON: I don't need it. That's fine.

12 MS. MANDEL: We have other copies.

13 THE COURT: Okay. Fine. As long as --
14 Ladies and gentlemen of the jury, you have it?
15 It's on my screen.

16 MR. CURRAN: Okay.

17 THE COURT: You have it there, right?

18 THE WITNESS: I do. I think this is terrific.

19 BY MR. CURRAN:

20 **Q.** So this is Exhibit B. This is the one in which you
21 subtracted the amounts that Dr. Menninger received and that
22 you expect to receive in Social Security disability --

23 **A.** That's correct.

24 **Q.** -- insurance? Okay.

25 Now, am I correct that the numbers -- and you

1 testified about this, but I just want to make clear. The
2 numbers in the column all the way to the right, those are
3 what you calculated the cumulative loss salary bonus and
4 benefit amounts to be each year, correct, at least in the
5 nominal field?

6 **A.** Yes.

7 **Q.** And the NPV is reduced for net present value?

8 **A.** That's correct.

9 **Q.** Okay. So if the jury were to disagree with your
10 assumption that Dr. Menninger won't be able to work for the
11 rest of her working life through 2036 and instead finds that
12 Dr. Menninger would be able to return to work at some point
13 in the interim, so, for example, if she were able to return
14 to work in January 1, 2020, am I right that your opinion is
15 that her total lost salary, bonus, and benefits amount would
16 be \$293,331?

17 **A.** If she could go back to work on January 1, '20 -- 2020?

18 **Q.** Correct.

19 **A.** Yes, that's what the numbers would indicate, and I just
20 like to clarify; you said my assumption. It was not my
21 assumption. It was an assumption given to me.

22 **Q.** Sorry about that. Yes. Okay. Understood.

23 So if the jury were to disagree with the assumption
24 that you were provided by Dr. Menninger's counsel and were to
25 conclude that she would have been able to return to work on

1 January 1, 2020, her lost wages, benefits and -- lost wages,
2 bonus, and benefits would have been \$293,331?

3 **A.** Yes. And they can do that for any year through 2036.

4 **Q.** Right. So if they determine that she could have -- she
5 could go back to work, you know, January 1 of next year, then
6 the amount would be, what?

7 **A.** Next year? 2024?

8 **Q.** Yeah. So it would be the \$1,639,797 number --

9 THE COURT REPORTER: I'm sorry. Could you say that
10 number again slower?

11 MR. CURRAN: Sorry. 1,639,797.

12 THE COURT: I think it's 1 million -- I see the net
13 present value number, yes.

14 THE WITNESS: 1,992,000, is that what you got?

15 BY MR. CURRAN:

16 **Q.** I think that's through -- through the end of 2024?

17 **A.** Excuse me. 1,639,000.

18 **Q.** Okay. All right. And the same goes for the rest of the
19 -- we don't have to go through all the rest of the years, but
20 that's -- that's --

21 **A.** That's the calculation. We provide that in case the
22 trier of fact wants something other than the full amount.

23 **Q.** Understood.

24 Now, these numbers in here all depend, of course,
25 on whether the jury agrees with all your other assumptions,

1 correct?

2 **A.** I didn't make a whole lot of assumptions.

3 **Q.** Okay. But to the extent that any of the assumptions you
4 did make turn out to be wrong, these numbers would be
5 incorrect, right?

6 **A.** For example, what assumptions are you talking about?

7 **Q.** All right. So, for example, you assumed that, if not for
8 PPD's alleged conduct, Dr. Menninger's would have remained
9 employed with PPD in the position that she held at PPD in
10 2018 or in a similar position until sometime in 2036.

11 **A.** Right. I mean, if there was no wrongdoing, there's no
12 damage calculation at all.

13 **Q.** Right. I'm not -- actually, it's a slightly different
14 question. It's not about wrongdoing. The assumption is that
15 she would have -- if there were no wrongdoing, she would have
16 remained employed at PPD or in similar position until 2036?

17 **A.** Correct.

18 **Q.** Okay. And that she wouldn't have retired earlier?

19 **A.** And she wouldn't have retired early.

20 **Q.** And it also assumes she wouldn't have, you know, for
21 example, decided to try and find a different job that more
22 aligned with her values, like maybe something in the arts?

23 **A.** Can you repeat that, please?

24 **Q.** Yeah. It assumes that she wouldn't, at some point, have
25 decided to find another job that aligned more with her

1 values, like something in the arts, for example, but that
2 paid less?

3 **A.** Yes. If she was making money into the future, yes, you
4 would consider that mitigation.

5 **Q.** Okay. And was the assumption that she would continue
6 working at PPD or in a similar job 'till 2036, was that
7 something that Dr. Menninger's attorneys asked you to assume?

8 **A.** They didn't give me a date. I had to decide and estimate
9 what her work-life was.

10 **Q.** Okay.

11 **A.** What -- the assumption that was given to me was that she
12 will not be able to work through the remainder of her work
13 life.

14 **Q.** Okay. And so that assumption was irrespective of when
15 the end of -- when you determined the end of her work life
16 would be, right?

17 **A.** Correct.

18 **Q.** Okay. So you're asked to assume that she wouldn't work
19 for the rest of her life before you knew how long her work
20 life would be, right?

21 **A.** In a similar position or a comparable position.

22 **Q.** Right.

23 Your calculations also assume that the, despite her
24 disability, Dr. Menninger would have been able to perform all
25 the essential functions of her job at PPD or a similar job

1 with or without accommodations through 2036, right?

2 **A.** I guess that's implicit, yes.

3 **Q.** Okay. Well, it's an assumption, right?

4 **A.** I don't know that I specifically made that assumption.
5 She was working. She was getting good reviews. I assumed
6 that she would be able to continue that through her work
7 life.

8 **Q.** Is it an implicit assumption?

9 **A.** I guess it is, yeah.

10 **Q.** Okay. Now, after Dr. Menninger's attorneys hired you to
11 provide an opinion in this case, they provided you with
12 documents about Dr. Menninger's compensation and other things
13 relevant to your calculations, right?

14 **A.** Correct.

15 **Q.** Did they ever provide you with any documents or other
16 information about the fact that PPD was acquired by another
17 company called Thermo Fisher Scientific --

18 **A.** No.

19 **Q.** -- in 2021?

20 **A.** No, sir.

21 **Q.** They did not? Okay.

22 So in forming your opinion about Dr. Menninger's
23 damages, you didn't consider the possibility that
24 Dr. Menninger wouldn't have remained in her position
25 following the acquisition by Thermo Fisher, right?

1 **A.** I knew nothing of an acquisition.

2 **Q.** All right. Now, getting back to your assumptions, you
3 assumed that Dr. Menninger would have received wage
4 increases, I think you said, of 2.7 percent every year for
5 18 years; is that right?

6 **A.** Correct.

7 **Q.** All right. And that was based on the fact that, during
8 the three-year period from 2016 to 2018, her annual average
9 wage increase was 2.7 percent; am I right about that?

10 **A.** Correct.

11 **Q.** Okay. So, for example, if we look back at this exhibit,
12 455, it looks like you calculated that Dr. Menninger's salary
13 and bonus in 2023 would have been 360,000 -- \$360,052, right?

14 **A.** Correct.

15 **Q.** Now, you got here yesterday, but did you come to court?

16 **A.** No, I did not.

17 **Q.** All right. Were you informed that yesterday there was
18 testimony that the person who currently holds Dr. Menninger's
19 job is paid a base salary in the range of \$275,000?

20 **A.** I was unaware of that.

21 **Q.** And that his most recent bonus was in the range of
22 \$30,000 to \$40,000?

23 **A.** I was not informed about that, at all.

24 **Q.** So the total of those two, on the high end of the bonus,
25 would be about \$305,000, right?

1 **A.** If that's the arithmetic, yeah.

2 **Q.** Yeah, I mean, I got a C in math in college, so I --

3 **A.** And that's why you became a lawyer.

4 **Q.** Among -- among other problems, but yeah.

5 So am I right about that, my math?

6 **A.** If your math is right, yes.

7 **Q.** 275 plus 40 is 305. Does that sound right?

8 **A.** 275 and --

9 **Q.** 40?

10 **A.** 315, something like that.

11 **Q.** Okay.

12 THE COURT: You didn't get a C in math, did you?

13 MR. CURRAN: You have better math than me. Thank
14 you. I'm glad you're here to check me math. Obviously, I
15 got a C math.

16 THE WITNESS: I am totally dependent upon Excel to
17 do arithmetic now.

18 MR. CURRAN: Maybe I should have used Excel before
19 I wrote that down.

20 BY MR. CURRAN:

21 **Q.** So 315. But in any case, 315 is a lot less than 360,000,
22 right?

23 **A.** Sure.

24 **Q.** All right. Now, after the three-year period from 2016 to
25 2018 that you used to project Dr. Menninger will receive

1 2.7 percent salary increases, PPD was acquired by
2 Thermo Fisher Scientific in 2021. You don't know about that,
3 though, right?

4 **A.** That's correct.

5 **Q.** Okay. And you don't know what Thermo Fisher's policies
6 or practices are with respect to salary increases for people
7 in the position that Dr. Menninger held?

8 **A.** I have no knowledge of that at all.

9 **Q.** All right. But you're assuming that Dr. Menninger would
10 have continued receiving the same wage increases each year
11 after the acquisition?

12 **A.** Yes, sir.

13 **Q.** And now you also assumed that every year from 2019 to
14 2036, Dr. Menninger would have received an annual bonus equal
15 to 20 percent of her salary; is that right?

16 **A.** Slightly less than 20. Yes, sir.

17 **Q.** Okay. And the basis for that assumption was what?

18 **A.** The bonuses she had received in the years preceding 2018.

19 **Q.** And those years were 2016 and 2017?

20 **A.** '16, '17, and '18, I believe.

21 **Q.** And '18? Okay. So three years.

22 So you assumed that because Dr. Menninger received
23 an average bonus of 20 percent in three years, that she was
24 going to receive an equivalent bonus every year for 18 years?

25 **A.** That's the best information we have.

1 **Q.** All right. And, again, the three-year period from 2016
2 to 2018, that was before Thermo Fisher acquired PPD?

3 **A.** If you say so.

4 **Q.** All right. And you don't know anything about
5 Thermo Fisher's policies or practices with respect to
6 paying --

7 **A.** Not at all.

8 **Q.** So, you know, according to the testimony we heard
9 yesterday and that I was talking about a minute ago, the
10 person who currently holds Dr. Menninger's position received
11 a bonus in the range of 30 to 40,000, and his salary is in
12 the range of \$275,000, right?

13 **A.** You can't ask --

14 MR. HANNON: Objection.

15 THE COURT: You're asking him if it's right?
16 Sustained. He doesn't know.

17 BY MR. CURRAN:

18 **Q.** Do you recall that?

19 **A.** I recall you just told me that.

20 **Q.** Okay. Now, if we assume that person's bonus is at the
21 higher end of that range, 40,000, is that -- am I right,
22 that's about 15 percent of 275,000?

23 **A.** If that's what the arithmetic is, yeah. I don't know.

24 **Q.** So that's less than 20 percent, right?

25 **A.** If that's the arithmetic.

1 **Q.** All right. Do you know what factors go into determining
2 whether someone in the position that Dr. Menninger held at
3 PPD receives a bonus at all, or if so, how much?

4 **A.** I don't know the criteria for the bonus, what -- I do
5 know how much she was getting.

6 **Q.** All right. And you don't know whether the factors that
7 apply now are the same as those that applied in 2016 to 2018?

8 **A.** I do not.

9 **Q.** And you don't know whether the US economy is going to
10 enter into a recession or even a depression at some point
11 between now and 2036?

12 **A.** Yeah, I would be in a different business if I knew that.

13 **Q.** Yes, for sure.

14 But you would agree with me it's possible to have a
15 recession or a depression in the next 18 years?

16 **A.** And we could have a boom also.

17 **Q.** Right. But you're assuming that Dr. Menninger would not
18 only have remained employed throughout the period, but also
19 she would have continued getting wage increases and
20 20 percent bonuses every year, right?

21 **A.** That's correct.

22 **Q.** Okay. Now, in calculating Dr. Menninger's damages, you
23 considered the fact that, from 2016 to 2018, PPD matched
24 50 percent of Dr. Menninger's 401(k) contributions; is that
25 right?

1 **A.** That's right.

2 **Q.** And you assumed that because Dr. Menninger had
3 contributed 6 percent of her annual salary each year, that
4 she would continue doing that for the rest of her working
5 life?

6 **A.** That's correct.

7 **Q.** What's the basis for that assumption?

8 **A.** The historical performance. Again, I don't have a
9 crystal ball to know exactly what's going to happen in the
10 future, but if you can look into the past, that is an
11 indicator of what's likely to happen in the future.

12 **Q.** And the past you looked to was three years, right?

13 **A.** I don't recall how many years it was.

14 **Q.** So it was 2016, 2017, 2018?

15 **A.** I don't recall how many years of 401(k) data we had.

16 **Q.** Did you look at her contributions prior to the time that
17 she started working at PPD?

18 **A.** No.

19 **Q.** All right. So if she started working at PPD in 2015, you
20 wouldn't have looking at anything before that, right?

21 **A.** That's correct.

22 **Q.** And what did you base your assumption on that's -- or I'm
23 sorry. One of your assumptions is that Dr. Menninger's
24 employer would have continued PPD's practice of making
25 50 percent contributions every year to a 401(k)?

1 **A.** Again, it's the historical pattern in the past.

2 **Q.** Okay. And I think, looking at your report, I think you
3 based your assumption on your PPD's US employee handbook?

4 **A.** Yes.

5 **Q.** And that was last updated in December 2016?

6 **A.** I don't have it in front of me, but it could be.

7 **Q.** Okay. If you look at your report, page 4, note 13.

8 **A.** Yep.

9 **Q.** And that's the handbook, right?

10 **A.** That's correct.

11 **Q.** All right. And you don't know whether Thermo Fisher
12 matches 401(k) contributions for people in the job that
13 Dr. Menninger held --

14 **A.** I don't know anything about this other company.

15 **Q.** All right. So it's fair to say that your calculation of
16 Dr. Menninger's lost wages and benefits depends on a number
17 of assumptions, correct?

18 **A.** What I would consider reasonable assumptions based on the
19 past.

20 **Q.** Okay. And if any of those assumptions turn out to be
21 unreasonable, if the jury thinks they're unreasonable, then
22 they would have to disagree with your calculations, right?

23 **A.** Certainly. For all we know, the 401(k) may jump to
24 10 percent, and they match 100 percent. I mean, I don't know
25 that. I can only go by what we have in the past.

1 MR. CURRAN: Thank you. I don't have any further
2 questions at this time.

3 THE COURT: All right. Any redirect?

4 MR. HANNON: Just a few questions, Your Honor.

5 THE WITNESS: Do you want this back?

6 MR. CURRAN: You can hang on to for now.

7 THE COURT: Keep it for now.

8 THE WITNESS: A souvenir?

9 MR. HANNON: Something for your last hurrah.

10 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

11 BY MR. HANNON:

12 **Q.** Mr. Jonas, you were asked questions about the acquisition
13 of PPD. If I were to tell you that it was acquired for
14 \$17.4 billion, would that make you more or less confident of
15 your calculations?

16 **A.** I don't think it would impact my calculations, because I
17 don't know if that's a lot or not a lot. It was a bargain
18 price. I don't know anything about that.

19 **Q.** Okay. And then you were asked about some testimony
20 yesterday. Am I right that when you do damage calculations,
21 that you try to rely upon reliable information?

22 **A.** As most -- as best we can -- the term is the best
23 available information.

24 **Q.** Okay. And some of that is assessing the credibility of
25 the source of the information, right?

1 **A.** Absolutely.

2 **Q.** And if you found that a person provided you information
3 and that person wasn't credible, would you rely upon it?

4 **A.** If I knew that the information was bad, I would
5 definitely not rely on it.

6 **Q.** And if you knew that the source of the information was
7 not credible, would that also cause you potentially not to
8 rely upon it?

9 **A.** I would look for other ways to justify what I was being
10 told --

11 **Q.** Okay.

12 **A.** -- and not rely on that one source.

13 **Q.** Okay. And then you were asked questions about that
14 20 percent bonus estimate. I want to show you one -- one
15 document here.

16 MR. HANNON: This is -- this is a letter document
17 that's not in evidence, Ms. Belmont. This will be
18 Exhibit BC --

19 BY MR. HANNON:

20 **Q.** And, sir, I'm showing you what's been marked for
21 identification as Exhibit BC. Is this Dr. Menninger's offer
22 letter that you reviewed?

23 **A.** I believe it is.

24 MR. HANNON: Okay. Your Honor, we offer this into
25 evidence.

1 THE WITNESS: I mean, without reading the whole
2 thing, it looks familiar.

3 MR. CURRAN: Sorry for the confusion, Your Honor.
4 The numbers aren't matching up with what we had for this
5 document.

6 THE COURT: I see.

7 MR. CURRAN: I don't think we have any objection to
8 the document that's in front of the witness.

9 THE COURT: Fine. So BC is admitted as -- what's
10 the next exhibit number?

11 THE DEPUTY CLERK: 456.

12 (Exhibit 456 admitted into evidence.)

13 THE COURT: 456.

14 Go ahead, Mr. Hannon.

15 And Ms. Belmont can display it to the jury.

16 MR. HANNON: Thank you.

17 BY MR. HANNON:

18 **Q.** So this is Dr. Menninger's offer letter from when she
19 started at PPD; is that right?

20 **A.** I believe so.

21 **Q.** Okay. I'm just going to show you here, on the second
22 page, you mentioned before that there was something in here
23 regarding her bonus; is that right?

24 **A.** That's correct.

25 **Q.** And --

1 **A.** I think that's the fourth line in the first paragraph.

2 **Q.** Sure. Sure. So just looking at this -- and this is the
3 part that says that the bonus target for your position is
4 21 percent of your base salary earned in a given year?

5 **A.** Correct.

6 MR. HANNON: Okay. That's all I have, Your Honor.

7 THE COURT: All right. Any recross?

8 MR. CURRAN: No, Your Honor.

9 THE COURT: All right. Thank you very much.
10 You're excused.

11 THE WITNESS: Thank you.

12 THE COURT: This is when you wanted to take the
13 break, right?

14 MS. MANDEL: Yes, Your Honor.

15 THE COURT: All right. So, ladies and gentlemen of
16 the jury, we have one more witness. And so we're going to --
17 that's the last witness today, the one more witness.

18 We're going to take the morning break now, which is
19 early. Hopefully the coffee and refreshments are there for
20 you. We'll see if our efforts, Ms. Belmont and mine, to
21 arrange that early succeeded. So we'll take the break now.
22 Then we'll return, we'll have the other witness, and then
23 when that's done, that will be one o'clock or earlier, we'll
24 be done for the day.

25 All rise for the jury.

1 (Jury not present.)

2 THE COURT: You know, Mr. Curran, you passed on
3 what clearly would have been the most devastating attack on
4 Mr. Jonas's credibility.

5 MR. CURRAN: What was that? He's from New York?

6 THE COURT: Well, you could have asked him --
7 You're from Long Island, right?

8 THE WITNESS: Right.

9 THE COURT: In fact, you've spent most of your life
10 in the New York metropolitan area?

11 THE WITNESS: That's correct.

12 THE COURT: And you are not a die-hard fan of the
13 Boston Red Sox?

14 THE WITNESS: It's opening day at Yankee Stadium
15 today.

16 THE COURT: There you go. That question -- he gave
17 it to you, and it's like.

18 MR. CURRAN: I could've impeach him --

19 THE COURT: You could have stepped down.

20 MS. MANDEL: Your Honor, without revealing our
21 confidences too much, I will say there is a note in my
22 notebook to Patrick about that exact question.

23 THE COURT: There you go. So it's all on
24 Mr. Curran. He was told what to do by you and he didn't
25 follow the advice of his partner in what was an obvious line

1 of cross-examination.

2 MS. MANDEL: Well, Patrick and I have worked
3 together, I think at this point, for 14 years. This is one
4 area where we disagree, so it's a point of contention.

5 MR. CURRAN: I was afraid he might say he's a Mets
6 fan and then I'd have to come and attack him.

7 THE COURT: So we have -- is there -- you're going
8 to rest --

9 MR. HANNON: I have to rest technically, right?

10 THE COURT: Yes. So you'll rest when the jury
11 comes back.

12 MR. HANNON: I'm just going to make that comment
13 regarding the exhibits and then I'll rest and --

14 THE COURT: Why don't you make your -- assume he's
15 rested now. I'll treat right now as if he's rested, so
16 whatever motions you want to make now, make them. And I -- I
17 am now saying that they are deemed to have been made after he
18 rested, and after I've admitted the joint exhibits as if you
19 made it, so we don't have to spend time in front of the jury,
20 and after the jury leaves with Mr. Kelly if you want to renew
21 them -- but they are -- for the record, for the Court of
22 Appeals, they are as if whatever you say now is made after he
23 rests, which is what he's going to do when the jury comes
24 out. I just don't see the point of having a sidebar in front
25 of the jury and make them sit there.

1 Anything -- so he's effectively rested. Are there
2 any motions you want to make? You don't have to, but I'm
3 just giving you the chance.

4 MR. CURRAN: Yeah. A motion for directed verdict,
5 Your Honor.

6 THE COURT: All right. Fine. I will deny that.
7 So anything else? We're just going to get
8 Mr. Kelly?

9 MR. CURRAN: Yes, Dr. Kelly.

10 THE COURT: Okay. So why don't we take a -- we'll
11 come back at 10:15.

12 How long do you think he's going to be?

13 MR. CURRAN: Apparently, he's not here yet. I know
14 he had a medical appointment this morning and so we're trying
15 to reach him and contact him, so -- hopefully he's walking
16 upstairs.

17 THE COURT: So I'll come back at 10:15, and
18 hopefully he's on the witness stand, and if he's not,
19 hopefully you'll have an update as to where he is and
20 what his ETA. Once he's on the witness stand, how long do
21 you expect him to be?

22 MR. CURRAN: 20, 25 minutes for me at most.

23 MR. HANNON: A little bit longer than that.

24 THE COURT: Okay. All right. Okay.

25 So assuming he's on at 10:15, we'll do the charge

1 conference. When he's done, we'll send the jury home and
2 then we can do the charge conference then. If he's not here
3 at 10:15, maybe we'll do the charge conference then.

4 Anything else? Okay.

5 (Court in recess at 10:04 a.m.

6 and reconvened at 10:27 a.m.)

7 THE COURT: You can sit down.

8 Dr. Kelly, are you able, when the jury comes back,
9 to stand up to take the oath, or do you prefer to sit?

10 THE WITNESS: Say again?

11 THE COURT: So ordinarily, we have witnesses stand
12 just when they take the oath, and then they sit down. I'm
13 just asking you, because of the medical issue that counsel
14 referred to, whether you're able to do that. And if you are,
15 I'll do that, but if you would like me to accommodate you to
16 have you just seated, I'll just have Ms. Belmont just say
17 raise your right hand.

18 THE WITNESS: Should I stand now?

19 THE COURT: You don't have to stand now. I'm just
20 asking which you want to do when she administers the oath?

21 THE WITNESS: When the jury comes in, I'll stand
22 and --

23 THE COURT: All right. And then you'll remain
24 standing while she administers the oath, and then you'll sit
25 down? Is that fine?

1 So there are two times ordinarily you would stand.
2 I'm -- it's fine. One is we all stand when the jury comes
3 in. It seems like you're saying you're able to stand when
4 they come in, correct?

5 THE WITNESS: Yeah.

6 THE COURT: Okay. Then you would ordinarily --
7 Ms. Belmont will ask you to raise your right hand to
8 administer the oath of truth-telling to you. And ordinarily,
9 I would have you stand up when you take the oath. If that's
10 difficult for you and you prefer to take the oath sitting
11 down, that's fine. There's no legal --

12 THE WITNESS: I'll stand for the oath.

13 THE COURT: Fine.

14 Go get the jury.

15 (Jury present.)

16 THE COURT: Mr. Hannon, anything else for you?

17 MR. HANNON: No more witnesses, Your Honor. The
18 plaintiff does move into evidence the remainder of the joint
19 exhibits that have not yet been offered.

20 THE COURT: Okay.

21 MR. HANNON: And with that, the plaintiff rests.

22 THE COURT: All right. So, ladies and gentlemen,
23 let me explain.

24 You have heard various exhibits referred to --
25 all -- most all of the exhibits -- all the exhibits have been

1 referred to by number are -- were admitted into evidence
2 along the way. I think I told you that at the beginning when
3 they referred to -- they had agreed to -- they were all
4 agreed to and I admitted them. So those are all in evidence.

5 In addition, what Mr. Hannon has just referred to
6 is there are other joint exhibits that haven't been talked
7 about with witnesses, and those are admitted and in evidence.
8 All of the things that are exhibits in evidence you will have
9 in the jury room copies of them for you to look at during
10 your deliberations. So that's one thing Mr. Hannon said.

11 The second he said is he rests. What that means is
12 the plaintiff is done presenting their case and they have no
13 more evidence or witnesses. So now we turn to the
14 defendant's case and their first witness.

15 MR. CURRAN: The defense calls Dr. Martin Kelly.

16 THE COURT: All right. And so we've arranged
17 Dr. Kelly to already be in the witness box just to get going
18 and while we were taking care of some other things while you
19 were out.

20 So if you would just raise your right hand,
21 Dr. Kelly, for the oath.

22 (Witness duly sworn.)

23 THE DEPUTY CLERK: And can you please state your
24 full name for the record?

25 THE COURT: You can sit down.

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MARTIN KELLY

having been duly sworn, testified as follows:

DIRECT EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. CURRAN:

Q. Good morning, Dr. Kelly.

THE COURT: Why don't you first state your name for the record, Dr. Kelly.

BY MR. CURRAN:

Q. Would you state your name for the record, sir?

A. My name is Martin Kelly, K-e-l-l-y.

Q. And Dr. Kelly, what do you do for work?

A. Say again?

Q. What do you do for work?

A. I'm a physician who practices the specialty of psychiatry.

Q. Okay. And how did you become involved in this case?

A. Say again, please?

Q. How did you become involved in this case?

A. In the fall of 2000, I got a call from someone in your law firm asking if I would serve as a consultant on this case.

Q. Okay. It might help if you pull the microphone a little closer to you.

There you go. Thank you.

So were you asked to review facts and details about

1 the case?

2 **A.** Say again, please?

3 **Q.** Were you asked to review facts and details about the
4 case?

5 **A.** Yes.

6 **Q.** And are you being compensated for the time that you spend
7 on the lawsuit?

8 **A.** I'm sorry; I -- I'm not hearing you well.

9 **Q.** Okay. Are you being compensated for the time that you've
10 spent on the lawsuit?

11 **A.** I haven't been to law school. Again, I'm --

12 **Q.** No, no. I'm sorry. Are you being compensated for the
13 time spent on the --

14 **A.** Oh. Yes, I hope so.

15 **Q.** And could you please walk us through your educational
16 background?

17 **A.** I received my premedical education at Boston College and
18 graduated with a bachelor of science in biology. I then
19 attended Tufts University school of medicine and received my
20 MD from Tufts. When I finished my medical school, I did a
21 medical internship at St. Elizabeth's Hospital and then did a
22 psychiatric residency at the Massachusetts Mental Health
23 Center.

24 **Q.** With respect to your work as a doctor, could you walk us
25 through your work history?

1 **A.** I'm sorry. I'm not hearing you well.

2 **Q.** I'm sorry. With respect to your work as a doctor, could
3 you walk us through your work history?

4 **A.** With respect to my work as a doctor, what?

5 **Q.** Can you walk us through your work history?

6 **A.** Yes.

7 **Q.** So what did you -- what did you do after finishing your
8 residency?

9 **A.** When I finished my residency, I worked for a year and a
10 half at Boston State Hospital in Mattapan at the adolescent
11 unit there, and then in 1970, I went to the Brigham. Then it
12 was the Peter Bent Brigham Hospital, and I've been on the
13 staff and had various positions at the Brigham and at Harvard
14 Medical School since that time.

15 **Q.** Okay. So how long approximately have you been working at
16 the Brigham and Women's Hospital?

17 **A.** I think I'm starting my 54th year in July.

18 **Q.** All right. That's quite a while. Can you explain to the
19 jury the status of your current engagement at Brigham and
20 Women's?

21 **A.** Current status of my practice is I -- I have a very
22 small, private practice, which I'm going to be closing at the
23 end of May; and I have a forensic psychiatry practice. I
24 have not taken any new cases for a couple years, but there
25 are a few in the pipeline.

1 **Q.** So you're still seeing patients today?

2 **A.** Yes.

3 **Q.** Has any of your work with patients in your years as a
4 psychiatrist involved mood disorders?

5 **A.** Yes.

6 **Q.** And what are mood disorders?

7 **A.** Mood disorders are conditions that the biochemistry of
8 the brain -- mood disorders used to be called
9 manic-depressive disorder. Now it's call bipolar disorder.
10 It's a mood disorder and the primary disturbance is either
11 mania or depression.

12 **Q.** Okay. And have you diagnosed and treated people with
13 mood disorders?

14 **A.** Yes.

15 **Q.** Have you worked with patients who have anxiety disorders?

16 **A.** Yes.

17 **Q.** And could you explain to the jury what anxiety disorders
18 are?

19 **A.** Could --

20 **Q.** I'm sorry; could you explain to the jury what anxiety
21 disorders are?

22 **A.** Anxiety disorders, there are many subtypes of anxiety
23 disorders. There's generalized anxiety disorder, in which a
24 person just tends to be very nervous much of the time.
25 There's panic disorder, in which an individual will have

1 sudden panic reactions.

2 Panic disorder can come associated with
3 agoraphobia, so when someone is out and about, say, shopping
4 at a supermarket, they suddenly get a panic attack and they
5 just have to get out of the store. They often will leave
6 their cart full of groceries and just -- "I got to get out of
7 here."

8 So those are the main anxiety disorders, and
9 there's also, which is at least an issue in this case, social
10 anxiety disorder, or social phobia.

11 **Q.** Okay. And in the course of your practice over the years,
12 have you diagnosed and treated people with anxiety disorders?

13 **A.** Yes.

14 **Q.** Now, aside from this case, are you currently doing any
15 other work that involves providing an expert opinion in
16 connection with a legal matter?

17 **A.** I'm not -- I don't have any current patients that have
18 anxiety disorder. I have a patient who has a mood disorder,
19 and I prescribed a prescription on Sunday to renew a
20 prescription for this gentleman.

21 **Q.** Okay. And are you currently doing any work aside from
22 this case that involves providing an expert opinion in a
23 lawsuit?

24 **A.** I have a bunch of cases that are in my file cabinet and
25 many of them are pre-COVID. So some of them may have settled

1 or gone away, but I don't -- have not been told about that.

2 I have recently been involved in helping out a
3 situation in which a four- to five-year-old youngster ran
4 down their driveway and was hit and killed by a Comcast
5 truck, and so I was advising the attorneys in that case.

6 **Q.** Okay. And currently about how much of your working time,
7 percentage-wise, do you spend on litigation-related work?

8 **A.** My private practice has slowly diminished because I
9 haven't been taking new patients since 2005. If I have seen
10 you before and you want to come back, that's okay; but I'm
11 not seeing new cases from scratch for the past 15-plus years.

12 **Q.** Okay. Have you published any articles in peer-reviewed
13 journals?

14 **A.** Yes.

15 **Q.** On what topics?

16 **A.** Mostly in psychiatry, clearly, but a particular interest
17 in psychosomatic medicine, general hospital psychiatry. The
18 Brigham does not have an inpatient psychiatric unit, and for
19 the first 25 years, we were a division of the department of
20 medicine and then got established as a department of
21 psychiatry.

22 So my publications are often in journals like the
23 *New England Journal of Medicine*, who's at risk for suicide
24 attempts in a hospital, who wants to read their record,
25 studying people who have signed out against medical advice

1 and what happens to them.

2 And I also coauthored a chapter in what was the
3 leading textbook of medicine about the psychiatric disorders,
4 a textbook that's called Harrison's textbook of medicine.
5 I've also published -- invited to do chapters in anesthesia
6 textbooks, how should you manage a patient who's receiving
7 psychiatric medications if they're going to be going under
8 anesthesia, do you continue them, do you stop them, things of
9 that sort.

10 So most of my publications have been in the medical
11 area and that's a core part of my identity and practice over
12 the years.

13 **Q.** Okay. Understood.

14 **A.** As opposed to asylum psychiatry. I did that at Boston
15 State Hospital for a year and a half, but we don't have an
16 inpatient unit, so I -- I don't do that kind of psychiatry.

17 **Q.** Okay. Do you hold any licenses or certifications?

18 **A.** Yes.

19 **Q.** What licenses or certifications do you hold?

20 **A.** I have a license to practice medicine. I've been board
21 certified in psychiatry. And those are the main
22 certifications and licenses in the psychiatric profession.

23 **Q.** Okay. Have you held any teaching appointments?

24 **A.** Say again, please.

25 **Q.** Have you held any teaching appointments?

1 **A.** Yes.

2 **Q.** What teaching appointments have you held?

3 **A.** When I was a resident at Mass Mental Health Center, I was
4 a teaching fellow in psychiatry for three years. When I went
5 to Boston State Hospital, I had an appointment as an
6 instructor in psychiatry at Tufts University school of
7 medicine. Tufts Medical School was kind of the department
8 that -- basically was the primary psychiatric department at
9 Boston State.

10 And then since I've been at the Brigham, I first
11 was an instructor in psychiatry and assistant professor of
12 psychiatry and currently associate professor of psychiatry at
13 Harvard Medical School.

14 **Q.** Okay. And what did you do to review the facts relevant
15 to this case?

16 **A.** I'm sorry; please say again.

17 **Q.** What did you do to review the facts relevant to this
18 case?

19 **A.** I was sent, over the past now two or three years, many
20 records. I'll try to remember most of them: Dr. Kessimian,
21 who was the main treater around the time this situation
22 started; past psychiatric treatment with Michael Everson, who
23 is in Kansas City, where she was living at the time, and he
24 saw her, like, on three occasions and prescribed Valium;
25 Butler Hospital day hospital; Dr. Burbano in Albuquerque,

1 New Mexico. Dr. Menninger moved from Massachusetts to
2 Albuquerque at the end of 2018, beginning of 2019.

3 And she's moved twice since then to Bend, Oregon,
4 where, apparently, she has family; and then approximately
5 2001/2002 [sic] moved to Portland, Oregon, and in both of
6 those situations was seen at a clinic by numerous
7 professionals.

8 **Q.** And you reviewed the records in connection with that
9 therapy?

10 **A.** Yes.

11 **Q.** Did you review any deposition transcripts?

12 **A.** I'm -- I -- I'm having trouble hearing you.

13 **Q.** Oh, I'm sorry.

14 **A.** Please.

15 **Q.** Did you review any deposition transcripts?

16 **A.** Oh, yes, yes. I reviewed the deposition of
17 Dr. Menninger, Dr. Summergrad, my own deposition -- I was
18 deposed. I reviewed various legal documents that were sent
19 to facilities to evaluate discrimination, positions of the
20 company PPD, and also Dr. Menninger's submission in regard to
21 this case.

22 **Q.** And did you interview Dr. Menninger?

23 **A.** Say again?

24 **Q.** Did you interview Dr. Menninger?

25 **A.** Yes, I did.

1 Q. Okay.

2 A. I interviewed her virtually December 9, 2020 --

3 Q. Okay.

4 A. -- I believe.

5 Q. And are these the types of activities that you would
6 normally do, normally conduct, when you're evaluating a
7 patient?

8 A. Clearly, doing an interview of the person is pretty
9 important if the person is around and, you know, is
10 accessible; but then you want to collect everything from some
11 factual matters. I reviewed her requests for accommodations,
12 for example. And I reviewed a bunch of emails in the
13 company, particularly in the spring of 2018 --

14 Q. Okay.

15 A. -- March, April, May -- several emails that involved her
16 and other people at the company.

17 Q. And when you interviewed Dr. Menninger in December 2020,
18 for how long did you speak with her?

19 A. The interview lasted approximately two hours and
20 20 minutes or so.

21 Q. Now, Dr. Kelly, in the context of a mental health
22 evaluation, what is a disorder?

23 A. Please say again.

24 Q. What is a disorder in the context of a mental health
25 evaluation?

1 **A.** The disorders that were in the records included primarily
2 social anxiety disorder, social phobia and treatment for
3 that.

4 **Q.** Right. But what I'm trying to ask, and I'm not doing it
5 very artfully, is what is a disorder, just sort of generally?

6 **A.** I'm sorry; I just --

7 **Q.** You can't hear me? I'm sorry.

8 **A.** The batteries in my hearing aids are running low, but I'm
9 having trouble.

10 **Q.** I'll talk louder. Sorry, I feel like I'm shouting.

11 THE COURT: You're not.

12 MR. CURRAN: What's that?

13 THE COURT: You're not shouting.

14 MR. CURRAN: I'm not. Okay.

15 BY MR. CURRAN:

16 **Q.** Just generally, what is a disorder?

17 **A.** A disorder, a psychiatric disorder, is -- or a mental
18 disorder is a wide range of conditions. They go from very
19 serious illnesses, such as schizophrenia, bipolar disorder,
20 paranoid disorders, and on the other spectrum, most of us
21 will be subject to some experience of grief. In our
22 lifetime, we will lose someone who was important to us,
23 things of that sort.

24 I mean, in the news, in Nashville, that's a
25 terrible situation, and the parents have a disorder, which

1 is, you know, a grief disorder. And that's not sensibly
2 thought of as an illness, like schizophrenia.

3 And then other disorders that are of concern can be
4 anxiety disorders, post-traumatic stress disorder,
5 personality disorders, who it's in the personality of the
6 individual. And that often becomes problematic, often for
7 other people; and it can be a depressive personality, a
8 disgruntled, unhappy, gloomy individual pretty consistently.
9 There may be some variation.

10 And then there are other personality disorders:
11 hysterical personality disorder, narcissistic personality
12 disorder, antisocial personality disorder. And so there's a
13 wide range of disorders, some of which are sensibly regarded
14 as illnesses -- bipolar disorder, schizophrenia -- and some
15 are reactive situations to events in the individual's life.

16 **Q.** I see.

17 Now, in diagnosing mental health disorders
18 generally, in your practice, how do you go about forming a
19 diagnosis?

20 **A.** Well, in a clinical setting, you -- the person makes an
21 appointment with you and you -- usually on the first
22 appointment, you may spend an hour or 90 minutes with the
23 individual clinically, and you take a history from the
24 individual.

25 And then you try to see if there are certain

1 patterns that lead to a particular diagnosis, highly
2 probable, but you also generally do a differential diagnosis.
3 If it's not A, it could be B, C, or D, and I will rule out
4 those conditions.

5 **Q.** Okay. Did you review the expert opinion that plaintiff's
6 medical expert, Dr. Summergrad, provided in this case?

7 **A.** I did.

8 **Q.** And did you see that Dr. Summergrad said in his opinion
9 that Dr. Menninger developed major depressive disorder in
10 2018?

11 **A.** Yes.

12 **Q.** What is major depressive disorder?

13 **A.** Major depressive disorder is a mood disorder. In the lay
14 press, it's often -- the person has a biochemical imbalance,
15 is the lay expression for it frequently. But it's a
16 biological condition. It tends to run in families, a high
17 probability of having a relative who's had it. It typically
18 comes on in late adolescence, early adulthood, 20s.

19 And then over the course of the individual's
20 lifetime, they will have times when they are depressed. And
21 in this day and age, people are aware of it, and so often
22 it's now spotted earlier. And the biochemical dysregulation
23 of the mood is very frequently fixed with medications --
24 again, biological, genetic disorder, and a number of physical
25 symptoms that often goes with it -- early morning, you can

1 wake up too early, you don't need -- and you wake up often in
2 a gloomy situation or catastrophizing, "Oh, this could be a
3 problem for me today."

4 Sometimes there's tearfulness, withdrawal from
5 activities that you used to enjoy, withdrawal from
6 friendships, but it's time limited. Before there were
7 medications, or shock treatments, the typical course was six
8 to nine months, occasionally longer. So the person would be
9 depressed six or nine months later, they're coming up and
10 they're kind of back to themselves.

11 **Q.** Okay. Thank you.

12 So based on your evaluation of Dr. Menninger
13 through your interview of her and your review of her records
14 and other documents, did you form an opinion as to whether
15 Dr. Menninger has major depressive disorder?

16 **A.** I did.

17 **Q.** And what is your opinion on that question?

18 **A.** In my opinion, she does not have this disorder. I could
19 not find the typical life course of episodes of depression in
20 early adulthood and continued through life.

21 I don't know that she has a strong family history
22 of major depressive disorder. When someone has a life event
23 that's distressing and depressing, that doesn't mean that
24 they have a major depressive disorder. They may have some of
25 the symptoms -- they're sad, they don't want to be out and

1 about, they don't care to do things they used to do -- but
2 the general consensus, in my view, is that a major depressive
3 disorder is not precipitated by a life event, by a life
4 event.

5 It's the chemicals that control mood and how you
6 perceive your life get dysregulated, and they can be treated
7 with antidepressants, can be treated with shock treatments.
8 People can be very depressed and suicidal in both major
9 depressive disorder, but also situations that are reactive to
10 powerful, negative life events.

11 **Q.** What sort of powerful negative life events are you
12 referring to there?

13 **A.** Can you --

14 **Q.** What sort of powerful negative life events are you
15 referring to there?

16 **A.** I could not see -- well, I think she was very upset that
17 the accommodations -- some of the accommodations that she was
18 requesting, the company did not feel they -- it was
19 consistent with the job, apparently. So -- but I think she
20 was shocked and surprised by that, and distressed.

21 **Q.** Based on your interview with Dr. Menninger and your
22 review of her medical records and other documents, did you
23 form an opinion as to whether she was able to work?

24 **A.** I did.

25 **Q.** And what is your opinion?

1 **A.** That she has no new condition that would prevent her from
2 working as a pathologist as she had during her residency, as
3 she did in a hospital setting for a few years, as she did in
4 a commercial laboratory, and then for a couple of years at
5 PPD; that she, by her own estimate, was able to do a good
6 job, and the company thought she was meeting their
7 expectations.

8 **Q.** Dr. Kelly, do you believe that Dr. Menninger is faking?

9 **A.** No.

10 **Q.** So do you think that she genuinely believes that she has
11 mental health disorders that keeps her from working?

12 **A.** I think she has a sincere but incorrect belief that she's
13 disabled. Again, prior to asking for accommodations, she
14 went to meetings, senior leadership team, traveled to
15 Brussels on several occasions to supervise that laboratory
16 and meet with people.

17 So she was functioning, in her own estimate, pretty
18 well in September and October of 2017, and Mr. Mekerri
19 thought she was meeting their expectations. There were some
20 things he would like her to do some more of, but there was,
21 in my view, no dramatic change in her job.

22 And, particularly, there was no -- she didn't
23 suddenly develop a condition -- Alzheimer's disease, had a
24 stroke, dementia -- that would interfere with her capacity to
25 do the job of a pathologist. So there was no new condition.

1 She was surprised, tearful, very upset when they said to her
2 at a meeting at the end of February, we can do a couple of
3 things you want for accommodations, but there are several
4 that are just incompatible with being the scientific head,
5 main pathologist in this pretty big company that has
6 laboratories in Brussels and China and Singapore and in
7 Kentucky.

8 **Q.** Now, I think you testified earlier that you had reviewed
9 the records, medical records from Bend, Oregon, and from
10 Albuquerque, New Mexico; is that right?

11 **A.** Correct.

12 **Q.** And do you have any concerns about the quality of
13 treatment that Dr. Menninger was receiving based on those
14 records?

15 **A.** Well, many of the records are problematic, in my opinion.
16 There's a tremendous amount of cut and paste that goes on in
17 the records. One example was Dr. Burbano, in Albuquerque,
18 literally took the paragraph that Dr. Kessimian had written
19 about her makeup, what kind of person she is, without
20 attributing it to Dr. Kessimian.

21 And most of the records are kind of chasing
22 symptoms rather than, okay, we have this woman who has
23 completed medical school, completed a residency, let's see if
24 we can get her back into the work force versus cataloging her
25 complaints and occasionally manipulating some of the

1 medications.

2 **Q.** Are there certain kinds of treatment that she has not
3 received that you think might be beneficial?

4 MR. HANNON: Objection. This is beyond the scope
5 of the report, Judge.

6 THE COURT: I think you should rephrase the
7 question, make it more focused. There's a small piece, I
8 think, that would be within the report; but, mostly, I think
9 Mr. Hannon is correct.

10 If you look at the supplemental report, what I'm
11 referring to in the supplemental report in the second to last
12 paragraph, the last sentence --

13 So you understand, ladies and gentlemen of the
14 jury, while the lawyers look at that, so experts produce
15 written reports. Generally speaking, juries don't see the
16 written reports. The written reports are disclosures because
17 they're a different kind of witness, and I'll explain a
18 little bit more about this in the final instructions, they're
19 giving opinions, as you can see. And you can see the experts
20 you heard in this case were not at PPD. None of them ever
21 knew Dr. Menninger before they did their clinical interviews
22 or their forensic interviews for these evaluations, or what
23 have you. And that's fine. That's what experts do.

24 But because of that, there are certain requirements
25 about it because they're not the typical percipient witness,

1 like the auto example, auto accident example, the person who
2 saw the accident. And so they make reports to disclose what
3 their opinions are and that -- what they reviewed and what
4 the basis of the opinion are, and then they are limited.
5 They can't -- the whole point of that is to prepare the case
6 so they're limited to the scope of that report. They can't
7 come up with new opinions, and that's the issue that's being
8 addressed.

9 Ready?

10 MR. CURRAN: Yes. Thanks, Your Honor.

11 THE COURT: Go ahead.

12 BY MR. CURRAN:

13 **Q.** Were you concerned about the treatment goals that her
14 treatment team has been setting for her? Did you have any
15 concerns about that?

16 **A.** Yes. There was no kind of plan to get this graduate of a
17 medical school, completed a residency --

18 MR. HANNON: Objection. This is beyond the scope.

19 THE COURT: Sustained. I think this is beyond the
20 scope.

21 MR. CURRAN: Okay. All right. I don't have any
22 further questions, Dr. Kelly.

23 THE COURT: All right.

24 MR. CURRAN: Thank you very much for your
25 testimony.

1 THE COURT: Cross-examination?

2 MR. HANNON: Yes, Your Honor.

3 May I approach the bench?

4 THE COURT: Yes.

5 MR. HANNON: May I approach the witness?

6 THE COURT: Yes.

7 MR. HANNON: May I proceed, Your Honor?

8 THE COURT: Yes.

9 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

10 BY MR. HANNON:

11 **Q.** Good morning, Doctor.

12 **A.** (No response.)

13 THE COURT: Can you hear him?

14 MR. HANNON: I'm sorry. I'll speak louder.

15 BY MR. HANNON:

16 **Q.** Good morning.

17 **A.** Good morning.

18 **Q.** Sir, you mentioned earlier that you're no longer seeing
19 new patients; is that right?

20 **A.** That's not correct. I have a very small private
21 practice. I prescribe antidepressants on Sunday to a patient
22 with major depressive disorder. I'm going to see that person
23 next week virtually, and I'll be wrapping up my private
24 practice at the end of May.

25 **Q.** My question, sir, was a little bit different. You're no

1 longer seeing new patients, right?

2 **A.** Oh. That's correct.

3 **Q.** Okay.

4 **A.** Correct. Sorry.

5 **Q.** In fact, sir, you stopped seeing new patients almost
6 20 years ago, right?

7 **A.** Approximately.

8 **Q.** Okay. And when you stopped seeing new patients
9 approximately 20 years ago, there were about 20 patients in
10 your practice; is that right?

11 **A.** Yes --

12 **Q.** Okay.

13 **A.** -- that --

14 **Q.** And with when you were deposed in this matter a couple of
15 years ago, at that time, you were down to five patients,
16 correct?

17 **A.** I'm sorry; say again, please.

18 **Q.** At the time you were deposed in this matter a few years
19 ago, you were down to seeing about five patients; is that
20 right?

21 **A.** That's correct.

22 **Q.** And in the last 20 years, sir, you have not treated a
23 patient with social anxiety disorder, have you?

24 **A.** I don't think so, no.

25 **Q.** In the last 20 years, sir, you have not treated a patient

1 with panic disorder, correct?

2 **A.** I -- I don't catalog things in that way. I may have, at
3 any moment, 20 patients, or later, five patients, but that
4 can be a revolving cast, if you will. Someone will ask to
5 come back and see me. They have some issue that they think
6 I -- that I've treated 25 or 35 years ago. So it's not like
7 they are the same five patients.

8 And those are just approximations of how my private
9 practice was.

10 **Q.** Sure. I'm not asking about the number right now. I'm
11 asking about patients with panic disorder. In the past
12 20 years, have you treated any patients with panic disorder?

13 **A.** I think I might have, but I can't recall one off the top
14 of my head. I don't catalog things that way, if you will.

15 **Q.** Sure thing.

16 And since you stopped accepting new patients in
17 your practice, your work has largely focused on being an
18 expert consultant, correct?

19 **A.** And mentor and teacher to residents in psychiatry and to
20 some relatively senior staff. So I'm kind of the old guy,
21 let me run this case by him, and the like. So I am active in
22 teaching, and that would involve residents and staff, people
23 who might be dealing with an anxiety disorder and they might
24 ask for my view of that.

25 But, again, I don't catalog things that way. I

1 mean, how many of this and how many of that is not how I tend
2 to think.

3 **Q.** When was the last time you were compensated for teaching?

4 **A.** When was the last time I what?

5 **Q.** You were compensated, you were paid for teaching?

6 **A.** The system at Harvard Medical School is that the
7 hospitals are on the hook for the salary of the staff, and
8 you get a teaching appointment. Currently, I'm associate
9 professor of psychiatry. But the medical school doesn't pay
10 you for teaching.

11 So -- and I have -- I have not received a salary
12 for my teaching activities in, as you point out, close to
13 20 years.

14 **Q.** Okay. So in terms of where you earn your living, part of
15 that comes from your private practice; is that right?

16 **A.** I didn't get the first part of that.

17 **Q.** No worries.

18 In terms of how you earn your living, part of that
19 comes from your private practice?

20 **A.** Yes. And my forensic practice.

21 **Q.** And that's it, right?

22 **A.** Yes.

23 **Q.** Okay. So in terms of the way that you're compensated for
24 the mentoring and being available to ask questions, that's --
25 that's all part of your private practice, right?

1 **A.** The acoustics for me in this courtroom are not very good.
2 Sorry. Could you go through it again? I'm sorry to ask you
3 to do that.

4 **Q.** No -- no worries at all.

5 In terms of how you're compensated for mentoring,
6 that's -- that's solely from your private practice, correct?

7 **A.** I'm not compensated for my mentoring. Okay? I don't
8 receive any salary for mentoring. I do continue to teach.
9 Residents often will come to court with me, or I'll brief
10 them on the elements of the case. So -- but I don't get any
11 money for that, yeah. I'm tempted to say I do it as a
12 volunteer out of the goodness of my heart, but I don't. I
13 don't need that. And the forensic activities are very well
14 compensated.

15 **Q.** Okay. And we'll talk about the forensic activities in a
16 moment.

17 In terms of your teaching, do you actually teach
18 classes?

19 **A.** Yes.

20 **Q.** How often?

21 **A.** COVID has interrupted things of that sort, so usually I
22 do a seminar, a two-hour block, one in the fall and one in
23 the spring. One of them has to do with orienting the
24 residents to forensics psychiatry, and the one in the spring
25 tends to be about psychosomatic medicine and the like.

1 **Q.** Okay. Let's focus on the --

2 **A.** I did much more of it, you know, in the past, but those
3 are the main ones that I do now.

4 **Q.** Very good. Thank you.

5 In terms of the forensic psychiatry work that you
6 do, how much of your professional time over the last ten
7 years has been devoted to serving as an expert witness?

8 **A.** Forensic psychiatry generally is about 90 percent of my
9 income.

10 **Q.** And one of your repeat clients, so to speak, is the
11 Commonwealth of Massachusetts, right?

12 **A.** Correct.

13 **Q.** And the instances when you've worked on behalf of the
14 Commonwealth typically involve instances concerning whether
15 or not someone is competent to stand trial, correct?

16 **A.** Correct.

17 **Q.** And when the Commonwealth needs an expert to say that
18 someone is competent to stand trial, you're the guy they
19 call?

20 **A.** Well, I wouldn't call them a client. The Commonwealth is
21 often a court or a district attorney, and they want -- they
22 have some reason to question whether someone is competent to
23 stand trial. So I -- I wouldn't quite agree with they want
24 someone to find the person "competent," kind of stuff. For
25 the most part, district attorneys and courts just want

1 competent opinions and --

2 **Q.** I didn't mean to cut you off.

3 And when they want a competent opinion in that kind
4 of a case, they come to you, right?

5 **A.** Say again, please.

6 **Q.** When the Commonwealth wants a competent opinion in that
7 type of case, they come to you. Yes?

8 **A.** Yes.

9 **Q.** You mentioned before a recent matter you became involved
10 with involving a child hit by a Comcast truck?

11 **A.** Correct.

12 **Q.** Did I hear that right?

13 **A.** Correct.

14 **Q.** Which side of the case were you retained on?

15 **A.** The defense.

16 **Q.** And what was the issue you were asked to examine?

17 **A.** I -- I didn't examine anyone in that case. I helped the
18 defense attorneys with understanding particularly the issues
19 for the mother of the child in anticipation of helping them
20 with a cross-examination of the plaintiff's expert.

21 **Q.** So your work there surrounded trying to minimize the
22 impact on the mother of the child struck by the Comcast
23 truck?

24 **A.** No.

25 **Q.** Was there an allegation there that the mother had become

1 depressed as a result of the death of her child?

2 **A.** Yes.

3 **Q.** And was it your opinion there that she did not become
4 depressed?

5 **A.** My opinion was that she was depressed, that this was a
6 tragic situation of a four- to five-year-old who ran down the
7 driveway going across the street to a friend's house, and
8 that she was in the house at the time, but her father was in
9 the driveway and saw the whole thing happening.

10 A terribly tragic situation. But it was not my job
11 to minimize anything. That was just tragic. However, the
12 expert for the plaintiffs made some allegations that I
13 thought were exaggerations.

14 **Q.** Did you believe the mother in that case had formed a
15 reactive depression?

16 **A.** Yes.

17 **Q.** And am I right it's your opinion in this case that
18 Dr. Menninger formed a reactive depression?

19 **A.** Yes.

20 **Q.** Now, you distinguish reactive depression from a major
21 depression disorder, correct?

22 **A.** Major depressive disorder, yes.

23 **Q.** And with respect to major depressive disorder, you take
24 issue with the word "major"?

25 **A.** I do.

1 **Q.** And in terms of the distinction that you draw between a
2 reactive depression and major depression -- I'm sorry --
3 major depressive disorder, really, the distinction to you is
4 what causes it, right?

5 **A.** Correct.

6 **Q.** In your opinion, sir, a reactive depression can be just
7 as painful as major depressive disorder. Yes?

8 **A.** It can be, depending on the circumstances, yes.

9 **Q.** And, sir, it's your opinion that if someone develops
10 depression in response to some kind of life event, then that,
11 by definition, is not major depressive disorder, correct?

12 **A.** Correct, basically.

13 **Q.** That is not an opinion held by the entire psychiatric
14 community, correct?

15 **A.** Nothing is held by the entire psychiatric community, but
16 I think it's generally thought that major depressive disorder
17 is a biological disorder, has genetic consequences; that it
18 responds to medications, antidepressant medications; has a
19 typical life history, onset in late adolescence, early
20 adulthood, over the decades, periods of being depressed, and
21 then getting treatment or spontaneously recovering.

22 But in terms of distress and painful, it depends on
23 the circumstances.

24 **Q.** So let's unpack that a little bit. So one thing you said
25 is that you believe that major depressive disorder has some

1 kind of a biological piece to it; is that right?

2 **A.** Yes.

3 **Q.** So normally a person with major depressive disorder,
4 there's some kind of family history that -- well, let me just
5 stop there. There's some kind of family history, right?

6 **A.** That's often the case, that there's a family history of
7 depressive disorders.

8 **Q.** What about other psychological disorders? Would that
9 also be a potential risk factor, so to speak, for a person
10 developing major depressive disorder?

11 **A.** Yes, it can be.

12 **Q.** Sir, were you aware in this case of the family history of
13 Dr. Menninger?

14 **A.** Say again, please.

15 **Q.** In your work in this case, did you become aware of
16 Dr. Menninger's family history of mental health issues?

17 **A.** Yes. That's in the records. I don't -- I don't -- there
18 was a comment in -- I believe it's Dr. Kessimian's records
19 that, on her paternal side and maternal side -- side, not
20 parents, necessarily -- that there was a history of
21 psychological problems.

22 **Q.** And would that history of psychological problems in
23 Dr. Menninger's family, would that be a risk factor for her
24 to develop major depressive disorder?

25 **A.** It could be, but I don't know enough of the details about

1 her family history. All of us have families that have some
2 individuals that have psychological problems.

3 **Q.** But some more than others, right?

4 **A.** Yes.

5 **Q.** And the experiences you read about in Dr. Kessimian's
6 notes concerning Dr. Menninger's parents, that's the kind of
7 thing that would present a risk factor for major depressive
8 disorder, yes?

9 **A.** Possibly. You need to know more about what kinds of
10 problems, psychological problems, existed, their intensity,
11 their nature. And in the records, I could not find any
12 comment other than on maternal and paternal side, there are
13 relatives that had psychological problems.

14 **Q.** When you interviewed Dr. Menninger in this case, did you
15 ask her for additional detail concerning her parents' mental
16 health issues?

17 **A.** I don't believe I did.

18 **Q.** And in terms of the time frame that we're talking
19 about -- well, strike that.

20 Did you also see in the medical records that
21 Dr. Menninger's daughter also suffers from mental health
22 issues?

23 **A.** There are comments in there that occasionally her
24 daughter has had problems in school and also has expressed
25 suicidal ideation.

1 **Q.** So would that be a yes?

2 **A.** Yes.

3 **Q.** Sir, would you agree with me that Dr. Menninger's family
4 history between both her parents and her daughter presents a
5 clear risk sign for development of major depressive disorder?

6 **A.** I would not.

7 **Q.** In addition to her family history, you saw that
8 Dr. Menninger, over the course of her life, had been
9 diagnosed with several disorders, right?

10 **A.** Dr. Kessimian?

11 **Q.** Pardon me if I misspoke -- that Dr. Menninger, over the
12 course of her life, had been diagnosed with several
13 disorders, yes?

14 **A.** The main one was anxiety disorder, general anxiety
15 disorder, GAD, and social phobia; and that was three
16 relatively brief visits in 2012 to 2015 in Kansas City.

17 **Q.** Sir, would you agree that having generalized anxiety
18 disorder is also a risk factor for the development of major
19 depressive disorder?

20 **A.** Not in my opinion. I know that there are some people who
21 feel that in the field, but I don't think that there's a
22 strong correlation between generalized anxiety disorder and
23 major depressive disorder.

24 **Q.** Have you done specific research on that issue?

25 **A.** No.

1 **Q.** Would you agree, sir, that having social anxiety disorder
2 also presents a risk factor for development of major
3 depressive disorder?

4 **A.** You used the word "also." I don't think that it is.

5 **Q.** You'd agree that others in the psychiatric community
6 disagree with you?

7 **A.** There are people in the psychiatric community that think
8 that that's a risk factor for depression, yes.

9 **Q.** Well, not just depression, sir, major depressive
10 disorder, yes?

11 **A.** Correct, yes. There are some in the field. I don't
12 subscribe to it, but there are some in the field that do.

13 **Q.** Speaking of disagreements, you don't believe that
14 Dr. Menninger even had social anxiety disorder; isn't that
15 right?

16 **A.** In my opinion, I think she is, in her makeup, an anxious
17 person. If she has social anxiety disorder, it's been, over
18 the years, well managed with just taking a Valium pill for
19 some meetings. So it's not a profound problem with her
20 functioning. She believes she has functioned very well. At
21 PPD, they thought her performance was fine.

22 So it's -- I could not find a major disruption in
23 her actual functioning doing what needed to be done. Was she
24 experiencing some anxiety in meetings where she might have to
25 be more active? Yes. But that doesn't, for me, really get

1 to a serious social anxiety disorder, social phobia.

2 **Q.** Sir, in your view, a person doesn't have social anxiety
3 disorder unless their symptoms are visible to others; is that
4 right?

5 **A.** That's not my opinion. I don't think they have to be
6 visible to others. They have to have some problem with
7 functioning if you have a pretty well established social
8 phobia, social anxiety disorder. It's got to be manifest in
9 your work activities in this situation.

10 **Q.** And sometimes people with social anxiety disorder, they
11 can manage those manifestations through medication, yes?

12 **A.** Yes.

13 **Q.** Would Valium be one of those medications?

14 **A.** Say again, please?

15 **Q.** Would Valium be one of those medications?

16 **A.** Yes.

17 **Q.** Medications like Valium have side effects, yes?

18 **A.** Yes.

19 **Q.** What are the side effects?

20 **A.** In my opinion, Valium is not a good drug for social
21 anxiety disorder. Valium tends to come on a couple hours
22 after you take it and lasts for a couple of hours -- two to
23 four. There are short-acting antianxiety drugs that will
24 come on in a half an hour and be washed out in two hours, and
25 there's no hangover.

1 And Dr. Menninger complained of kind of lingering
2 effects after a meeting from taking the Valium. So, yes,
3 it's used that way, but my own sense is that there are better
4 drugs without significant side effects, such as a kind of
5 later-in-the-day hangover with the Valium.

6 **Q.** My question is, sir, is what are the side effects of
7 Valium?

8 **A.** Generally, there aren't many serious side effects. You
9 can be sleepy. You can be less cognitively efficient,
10 clouded kind of stuff. Rarely, there are GI,
11 gastrointestinal problems, but those are the main ones that
12 occur to me.

13 **Q.** Did Dr. Menninger report having side effects from taking
14 the Valium?

15 **A.** Yes.

16 **Q.** You also do not believe that Dr. Menninger had panic
17 disorder; is that right?

18 **A.** Yes, I don't think she did.

19 **Q.** You know that she reported having panic attacks?

20 **A.** Say again, please.

21 **Q.** You know that she reported having panic attacks?

22 **A.** Yes.

23 **Q.** Your opinion, sir, is those weren't actually panic
24 attacks, right?

25 **A.** The context is she did not describe panic attacks prior

1 to the request for accommodations. When they could not go
2 along with the accommodations, she was very anxious, "What's
3 going to happen to me? What's going to happen to my family?"
4 and the like.

5 I would not call that a panic attack. Panic
6 attacks are, again, conditions that tend to come on in early
7 adulthood and can be recurrent.

8 **Q.** Let me describe for you an event, and please tell me if
9 this sounds consistent with a panic attack. This would be
10 someone's observations of the individual.

11 "During one of our social situations, she sought me
12 out and was unable to communicate clearly. Her breathing was
13 rapid. She did her best to hold back tears, unable to fully
14 communicate what was happening to her, and it took several
15 minutes to recover enough to explain what she was
16 experiencing."

17 Doctor, does that sound like a person who's having
18 a panic attack?

19 **A.** It would -- I would be curious as to the timing of that.
20 Was that before or after the request for accommodations? If
21 it was before that she was having that experience, then that
22 would be a vote in the direction of panic attacks.

23 **Q.** So it's only a panic attack if it happened before the
24 unlawful conduct she alleges?

25 **A.** Again, I would be curious as to the timing of that

1 comment. Was it before or after she requested accommodations
2 from PPD? If it was before, then that would be a vote in the
3 direction of that she has panic attacks.

4 **Q.** You know -- you know Dr. Summergrad, right?

5 **A.** I do.

6 **Q.** He has a good reputation in the psychiatric community?

7 **A.** Yes.

8 **Q.** Do you believe he was -- you -- strike that.

9 You read his expert report?

10 **A.** Yes.

11 **Q.** Based upon your knowledge of Dr. Summergrad, would you
12 agree that the opinions expressed in his report are genuinely
13 held by him?

14 **A.** I would assume so, yes.

15 **Q.** No reason to think otherwise?

16 **A.** No.

17 **Q.** Going back to reactive depression, you agree that
18 Dr. Menninger developed a reactive depression in 2018; is
19 that correct?

20 **A.** Yes.

21 **Q.** And prior to the development of that depression,
22 Dr. Menninger had not previously shown symptoms of
23 depression, right?

24 **A.** Correct.

25 **Q.** In fact, sir, that's the -- that's one of the reasons why

1 you disagree with the diagnosis of major depressive disorder,
2 correct?

3 **A.** Correct.

4 **Q.** And, sir, you agree that Dr. Menninger's development of
5 reactive depression in 2018 was caused by PPD, yes?

6 **A.** No. I have a problem with the term "caused by." It's --
7 I mean, reactive depression is not mysterious. Something bad
8 happens in your life, and you react with sadness and upset,
9 and you're depressed and you're unhappy. It's not like some
10 really tricky, arcane kind of problem.

11 **Q.** But my question, sir, concerns what was the bad thing?
12 What was the life event that caused her to form this reactive
13 depression?

14 **A.** That PPD considered her requests and apparently felt that
15 the requests that she had, 2, 3, and 4 on the list, were
16 incompatible with being the senior scientist, head
17 pathologist at PPD.

18 **Q.** So to be clear, sir, you would agree with me that there
19 wasn't some other major life event that caused Dr. Menninger
20 to form major --

21 **A.** I have a problem with the "caused."

22 **Q.** Let me get the question out.

23 **A.** It was an occasion, okay, precipitant, trigger. But
24 caused -- this is probably a multifactorial situation.

25 It's -- think for a second about a light switch. You go to

1 the light switch and you flick it on and the light comes on.
2 Did flicking the switch cause the light to go on? Not
3 really, because the electric company is on the street, there
4 are wires into the house, there's wires -- kind of thing.

5 So just because something happens after an event
6 doesn't mean it is a cause of that event.

7 **Q.** Let's use your light switch analogy. You'd agree with me
8 that PPD's response to Dr. Menninger's request for
9 accommodation was the light switch that brought on her
10 reactive depression?

11 **A.** There's problems with analogies, but yes. But, again,
12 "caused" is not something that I -- the cause could be that
13 her request was over the top.

14 **Q.** Do you recall -- do you recall being deposed in this
15 matter?

16 **A.** Say again?

17 **Q.** Sorry. Do you recall being deposed in this matter?

18 **A.** Yes.

19 **Q.** In the binder in front of you, at the first tab, you'll
20 find a copy of your deposition transcript. If you could
21 please turn to page 59.

22 **A.** Yes. I have it.

23 **Q.** And if you could look at -- it's actually page 58,
24 line 23 -- actually, I'm sorry. Go to page 59.

25 **A.** Page 51?

1 **Q.** 59, line 5. And please read along silently as I read out
2 loud. "What decision" --

3 **A.** I'm on page 59. What line?

4 **Q.** Line 5, please.

5 "What decision of the company do you believe caused
6 her depression?"

7 **A.** Okay.

8 **Q.** "ANSWER: --

9 **A.** I hope I've made it clear my problem with the word
10 "caused."

11 THE COURT: Let him just first finish the question.
12 Hold on, Dr. Kelly.

13 You read that part. What's the question, or you're
14 not done?

15 MR. HANNON: I'm not done yet. Let me read the
16 question and answer.

17 THE COURT: Go ahead.

18 BY MR. HANNON:

19 "QUESTION: What decision of the company do you believe
20 caused her depression?

21 "ANSWER: The decision that the accommodations that she
22 was requesting, she can meet some of them, but several were
23 incompatible with the position she held in the company."

24 Did I read that right?

25 **A.** Yes.

1 **Q.** Now, to be clear, sir, you go on to note that causation
2 here, you mean more precipitation, right?

3 **A.** Well, their response to her request surprised her. She
4 thought it would be no problem and she was very upset. I
5 have a problem with the word "caused," because maybe her
6 request for accommodations were inappropriately --
7 inappropriate and excessive.

8 So maybe that's where the chain of events should
9 start; but, again, I have problems with the word "caused."

10 **Q.** Following PPD's rejection of Dr. Menninger's
11 accommodation request, there was other conduct that
12 contributed to Dr. Menninger's depression; is that right?

13 **A.** I don't know what you're referring to.

14 **Q.** Well, you're aware that in early June of 2018,
15 Dr. Menninger's doctor recommended that she take a medical
16 leave, correct?

17 **A.** Absolutely not. Her doctor was against her taking
18 medical leave. She had decided she was going to, but if you
19 look carefully at Dr. Kessimian's records -- particularly,
20 for example, May 25th -- there's a quotation in there, "I
21 discussed honestly with her that she has not tried the gold
22 standard for treatment of social anxiety disorder; namely,
23 exposure therapy," which is correct.

24 So Dr. Kessimian didn't recommend that she take
25 leave, but rather was saying, "Ooh, slow down. Maybe you

1 ought to try some other approaches that will help you stay on
2 your job at PPD." That's May 25th.

3 **Q.** Sir, you would agree that Dr. Menninger became suicidal?

4 **A.** She had passive suicidal ideation, which is described in
5 both Dr. Kessimian's record. It was somewhat fleeting. It
6 was expressed in the end of April and had resolved by
7 May 18th, which was her next visit.

8 And she reassured Dr. Kessimian that she was not
9 really suicidal. It's just that this was weighing on her, it
10 was very hard, and the like; and that qualifies as passive
11 suicidal ideation. "Some days, I wish I didn't wake up. I
12 can't take this," as, in the field, can be regarded as
13 passive suicidal ideation.

14 "I know where my husband's gun is," that's suicidal
15 ideation, she's thinking about how she might do it, which is
16 not the case here.

17 **Q.** Sir, you've seen instances in the past where a person
18 suffering from what you call "reactive depression" has taken
19 their own life, yes?

20 **A.** Has taken?

21 **Q.** Has killed themselves?

22 **A.** Yes.

23 **Q.** I'm going to show you Joint Exhibit Number 1. Doctor,
24 this is an expert report that you prepared back in May of
25 2011; is that right?

1 **A.** That's correct.

2 **Q.** You prepared this report on behalf of a gentleman's -- on
3 behalf of the family of Jeffrey Chaput; is that right?

4 **A.** Yes.

5 **Q.** Do you recall this case?

6 **A.** Somewhat, yes.

7 **Q.** Mr. Chaput had gotten hurt at work?

8 **A.** Yes, he did. There was a heavy bucket full of weighty
9 materials, and he had a crush injury of his hand and ongoing
10 pain that was not able to be treated easily.

11 **Q.** And then he lost his job?

12 **A.** Yes. He couldn't do the work.

13 **Q.** And then he could no longer provide for his family?

14 **A.** And then he developed?

15 **Q.** I said and then he was no longer able to provide for his
16 family?

17 **A.** Yes. That weighed very heavily on him.

18 **Q.** And then he developed depression?

19 **A.** Yes.

20 **Q.** And then he killed himself?

21 **A.** Yes.

22 **Q.** I show you now Joint Exhibit 2. Is this an expert report
23 that you prepared on behalf of the family of Gilbert Dube?

24 **A.** Yes.

25 **Q.** Mr. Dube got hurt at work?

1 **A.** Yes.

2 **Q.** He went on total disability?

3 **A.** I'm not recalling that. He might have. I think they let
4 him go.

5 Okay. Let me just --

6 **Q.** The bottom sentence there, you see it says, "On
7 December 4, 2001, while collecting total disability"?

8 **A.** Okay. Yes.

9 **Q.** And then he lost his job?

10 **A.** Yes.

11 **Q.** And then he had difficulty providing for his family?

12 **A.** Correct.

13 **Q.** And then he killed himself.

14 **A.** Yes.

15 **Q.** In your opinion, you note how his suicide was a complete
16 shock and surprise to his family and people who knew him
17 well, right?

18 **A.** Yes.

19 **Q.** He had historically been a strong, positive, somewhat
20 happy-go-lucky individual who prided himself on hard work,
21 right?

22 **A.** Correct.

23 **Q.** In both of these instances that we just looked at,
24 Mr. Dube and Mr. Chaput, you opined that the suicides were
25 causally related to the loss of their job; is that right?

1 **A.** Yes.

2 **Q.** Now let's take a look at Dr. Kessimian's notes. I'm
3 going to show you Joint Exhibit Number 18. So we're looking
4 at here the 44th page of the exhibit.

5 Sorry, my highlighter is not working, but if you
6 look towards the top of the page, you'll see there the "DOS:
7 6/1/18."

8 Do you see that?

9 **A.** Yes.

10 **Q.** So you understand this is a note of a visit with
11 Dr. Kessimian on June 1, 2018?

12 **A.** Yes.

13 **Q.** The chief complaint of Dr. Menninger that day was, "I
14 just can't do it anymore. I'm not sleeping, eating. I'm
15 having thoughts about ending my life, but I wouldn't do it
16 because of Maya and Mason."

17 Do you see that?

18 **A.** That's what the note says, yes.

19 **Q.** My projector is not working right now, but are you aware,
20 sir, that that was the same visit on which Dr. Kessimian
21 recommended that Dr. Menninger take a leave of absence from
22 work?

23 **A.** I have a notebook that's in the gallery with
24 Dr. Kessimian's notes in it. Is it possible I could have
25 that on the stand? It might solve the projection problems.

1 **Q.** No. If you can just tell the jury now if you recall if
2 it was on that visit on June 1, 2018 that Dr. Kessimian
3 recommended that Dr. Menninger take an immediate leave of
4 absence from work.

5 **A.** Again, I'm -- the appointment right before this one,
6 May 25th, bottom of the first page, is very explicit, in my
7 opinion, about Dr. Kessimian's thoughts about how this ought
8 to be handled, not going on disability, not going into a day
9 hospital, not taking a leave of absence.

10 Again, I -- I'm a little bit at -- I'm having
11 difficulty dealing with it. I have Dr. Kessimian's records
12 in my briefcase that an associate has and I could deal with
13 it directly to solve your projection problems.

14 **Q.** Well, let me ask you a different question. You'd agree
15 that a person suffering depression sometimes has good days?

16 **A.** Yes. There can be some fluctuation in things.

17 **Q.** And they sometimes have bad days, right?

18 **A.** Yes.

19 **Q.** Yes?

20 **A.** Yes.

21 **Q.** And you mentioned before Dr. Kessimian's reference to
22 exposure therapy?

23 **A.** Yes.

24 **Q.** Did I hear that right?

25 **A.** Yes.

1 **Q.** And exposure therapy is --

2 **A.** Oops.

3 **Q.** Is that what it sounds like?

4 **A.** Say again?

5 **Q.** Is that essentially exposing a person to something that
6 sort of causes them pain or discomfort in order to help them
7 build a tolerance?

8 **A.** Basically, that's the principle. It can take various
9 forms. Back in the '80s and '90s, people with a fear of
10 flying could go over to Logan Airport, could go into a
11 hangar, walk around an airplane, that kind of thing. And
12 there's also the phenomena of habituation; namely, if you go
13 to meetings and master them, maybe with the help of
14 medication, then that's an exposure therapy that can be a
15 very effective treatment in social anxiety disorder.

16 **Q.** Would you agree that, before engaging in exposure
17 therapy, you need to make sure that the person can withstand
18 the exposure without suffering self-harm?

19 **A.** The exposure therapy initially causes -- likely -- I
20 should not use the word "cause." A person will experience
21 anxiety; and then, over time, the exposure exercises lessens
22 the experience of anxiety.

23 **Q.** My question, sir, though, is if you're going to treat
24 someone with exposure treatment, you want to make sure that
25 they're capable of handling the exposure, right?

1 **A.** Yes.

2 **Q.** And --

3 **A.** You would not do it if you had serious concerns that this
4 would be very difficult, very, very difficult for the
5 individual and maybe we ought to go very slowly here.

6 **Q.** And now that I've stalled long enough to fix my iPad,
7 let's take a look at Dr. Kessimian's recommendation on
8 June 1st.

9 So I'm showing you now Joint Exhibit 18 and you see
10 here, sir, Dr. Kessimian recommended immediate medical leave
11 starting on Monday -- it says "2/2" -- to level of anxiety
12 and safety issues, monitor GI distress and appetite.

13 Do you see that?

14 **A.** It -- the reference to "2/2," that look like it's
15 February 2nd, which was, I think, the second appointment that
16 she had with Dr. Kessimian. So I don't -- this may be in the
17 June time frame, but it doesn't kind of -- "Safety --
18 recommended immediate medical leave starting on Monday 2/2 to
19 level anxiety and safety issues, monitor GI distress and
20 appetite."

21 **Q.** Well, let me help you orient in terms of when this is.
22 I'll turn back two pages. And you'll see this is
23 Dr. Kessimian's note on June 1, 2018; do you see that?

24 **A.** Then that probably is a typo of the 2/2, yeah.

25 **Q.** So would you agree with me, sir, that on June 1, 2018,

1 Dr. Kessimian recommended immediate medical leave?

2 **A.** Yes, it appears so.

3 **Q.** Is it your opinion, sir, that Dr. Kessimian was -- was
4 wrong in concluding that that was necessary?

5 **A.** It speaks for itself. I mean, it at -- that is very
6 different from a May 25, 2018 note.

7 **Q.** Sure. I'm not asking you if it's different; I'm asking
8 you if you believe that Dr. Kessimian, that her advice here
9 was wrong. Do -- do you have an opinion one way or the
10 other?

11 **A.** I -- "recommended immediate medical leave," that's what
12 it says in that note. Dr. Menninger had already decided to
13 go on medical leave.

14 **Q.** That wasn't my question, sir. My question is whether or
15 not you disagree with Dr. Kessimian's recommendation of
16 immediate medical leave. Do you?

17 **A.** I disagree that she should have had a medical leave.

18 **Q.** I think I heard you say on examination from PPD's lawyers
19 that reactive depression should be treatable with drugs; is
20 that right?

21 **A.** Reactive depression should -- what?

22 **Q.** Is something you should be able to treat with drugs, yes?

23 **A.** No.

24 **Q.** You believe depression in general should be responsive to
25 drugs; is that right?

1 **A.** In my opinion, major depressive disorder, a biological
2 genetic condition, is the only depressive disorder that
3 responds to medication via the chemical properties thereof.

4 Now, if you have a very sympathetic doctor and
5 prescribes a medication to help you with your reactive
6 depression and tells you, "I think it will help you," that,
7 in my opinion, is more likely to be a placebo effect given
8 the totality of those circumstances.

9 **Q.** Well, sir, you've seen that over the course of
10 Dr. Menninger's treatment, that she's been taking drugs,
11 right?

12 **A.** Off and -- well, for the most part, she has been taking
13 medications. Occasionally, she comes off medication, usually
14 spontaneously, if she decides that she's going to stop the
15 medication.

16 **Q.** Spontaneously? What do you mean spontaneously?

17 **A.** There's a sequence in the Portland clinic in 2022 in
18 which she decides when she's seeing the nurse practitioner
19 who is prescribing medications, she says to the nurse
20 practitioner, "I think I want to do this using the things
21 that I've learned from my counseling," and she comes off the
22 medication; and then a couple months later, she wants to go
23 back on it.

24 So she is significantly influencing the medication
25 choices.

1 Q. She's trying to get better; isn't that right?

2 A. I don't think she's malingering. Okay?

3 Q. So you'd agree --

4 A. But --

5 Q. -- that she's trying to get better?

6 A. But she's resistant to talking about returning to any
7 medical-type activity in 2022, so even -- oops -- even
8 discussing it with her counselor.

9 Q. And, sir, that's what people do when they have traumatic
10 events in their life, right?

11 A. They can.

12 Q. Your kid gets hit by a Comcast truck, you're probably not
13 ordering Comcast in the future, right?

14 THE COURT: I think that's beyond the scope,
15 Mr. Hannon, of the medical expert's opinion, as to whether
16 you would be ordering Comcast or not.

17 BY MR. HANNON:

18 Q. If you suffer a traumatic event that gives you suicidal
19 ideation, you're probably going to be concerned about putting
20 yourself back in that same position, yes?

21 A. There was no evidence of suicidal ideation until the
22 April 23rd visit, and it was resolved two weeks later,
23 June 1st. So at least until the end of April, there were no
24 suicidal issues while she was still active, albeit from a
25 distance, with PPD.

1 Q. You believe that Dr. Menninger not -- strike that.

2 You believe that notwithstanding her depression
3 that Dr. Menninger is capable of returning to work; is that
4 right?

5 A. Yes.

6 Q. You're aware, sir, that Dr. Menninger was awarded
7 long-term disability benefits?

8 A. Yes.

9 Q. That was by Unum Insurance Company?

10 A. Yes.

11 Q. They concluded she couldn't work?

12 A. Yes.

13 Q. She was awarded Social Security disability benefits?

14 A. I believe that's correct.

15 Q. The United States government decided she was unable to
16 work?

17 A. I don't know if it was the government. It was the Social
18 Security Administration and the consultants.

19 Q. They're notoriously tough to convince that someone with a
20 mental health disorder is unable to work, aren't they?

21 A. Say again, please?

22 Q. Social Security is notoriously difficult to convince that
23 a person with mental health problems is unable to work; isn't
24 that right?

25 MR. CURRAN: Objection.

1 THE COURT: Overruled. If you know.

2 THE WITNESS: They make a determination that she
3 was eligible for disability benefits.

4 BY MR. HANNON:

5 Q. And you think they got that wrong?

6 A. I do.

7 Q. And you think Unum got it wrong?

8 A. Say again?

9 Q. You think Unum got it wrong?

10 A. Sorry. Again?

11 Q. Unum, the insurance company, you think they got it wrong,
12 too?

13 A. My opinion is that she has no condition that would
14 prevent her from returning to the workplace as a pathologist.

15 Q. You think Dr. Everson, the doctor that saw her in
16 Kansas City, you think that he was wrong, right?

17 A. No, I don't think that.

18 Q. Well, he diagnosed her with generalized anxiety disorder,
19 right?

20 A. Yes. He didn't diagnose her with disability.

21 Q. And you think he was wrong about the generalized anxiety
22 disorder, right?

23 A. I think that that's defensible, but I think it's pretty
24 clearly social anxiety disorder as a more precise diagnosis.

25 Q. Okay. So now you would diagnose her with social anxiety

1 disorder?

2 **A.** Say again?

3 **Q.** So you would agree with the social anxiety disorder
4 diagnosis?

5 **A.** I think it's possible, but if it's present, it's a
6 pretty -- it's not a really major disruption in her capacity
7 to function. She takes a Valium pill, is able to go to some
8 meetings. It's not clear that she always takes it, but
9 that's the level of the "disorder," if you will, that she was
10 able to do things with just a small amount of Valium.

11 **Q.** You know that Dr. Menninger, when she went to Butler
12 Hospital, that they diagnosed her with major depressive
13 disorder?

14 **A.** Yes.

15 **Q.** You believe they got that wrong?

16 **A.** Yes.

17 **Q.** You know that when Dr. Menninger was being seen by
18 Dr. Burbano in New Mexico, that Dr. Burbano diagnosed her
19 with major depressive disorder?

20 **A.** Yes.

21 **Q.** You believe Dr. Burbano got it wrong?

22 **A.** Yes.

23 **Q.** You know that Dr. Menninger's doctors in Oregon, they've
24 diagnosed her with major depressive disorder, yes?

25 **A.** I think that's carried on in the records, yes.

1 **Q.** And you think they got that wrong, right?

2 **A.** I don't think she has it.

3 MR. HANNON: That's all I have, Your Honor.

4 THE WITNESS: For the reasons I spelled out a few
5 times today.

6 THE COURT: That's it. There's no question
7 pending, Dr. Kelly.

8 Any redirect?

9 MR. CURRAN: No, Your Honor.

10 THE COURT: All right. Thank you very much.

11 Is that the remainder of -- no other witnesses,
12 right?

13 MR. CURRAN: Yeah. No other witnesses.

14 THE COURT: Okay. So, ladies and gentlemen --

15 So the defense rests; is that correct?

16 MR. CURRAN: Correct, the defense rests.

17 THE COURT: No rebuttal case, right?

18 MR. HANNON: None, Your Honor.

19 THE COURT: So, ladies and gentlemen, that
20 concludes all of the evidence in the case. You still need to
21 keep an open mind. You still can't discuss among yourselves.
22 You still can't discuss it with anyone else. You still can't
23 do any independent research. You haven't heard everything,
24 so we're going to end for the day.

25 You are going to come tomorrow morning. We'll

1 start. We'll have the closing arguments from the lawyers.
2 That will run, in total, about an hour and a half, give or
3 take a little bit.

4 We'll also have my instructions to you on the law
5 and then you'll retire to the jury room. We'll bring in the
6 exhibits so you have them, then you can commence your
7 deliberations, then you can discuss the case -- at that
8 point, you can then discuss the case, obviously, among
9 yourselves. All right.

10 But for the moment, don't discuss the case among
11 yourselves. Don't discuss it with anyone else. Keep an open
12 mind. Although you have heard all the evidence in the case,
13 you haven't heard from the lawyers. They do not provide
14 evidence, but they do provide arguments that can be helpful
15 to you, and you haven't heard my instructions on the law.

16 All right. All rise for the jury.

17 Thank you for your attention.

18 (Jury not present.)

19 **JURY CHARGE CONFERENCE**

20 THE COURT: So, Dr. Kelly, you're free to step down
21 and go on your way. I have some things to talk to the
22 lawyers about.

23 Okay. Mr. Hannon, have anything on the jury
24 instructions?

25 MR. HANNON: I do, Your Honor.

1 THE COURT: Okay.

2 MR. HANNON: So beginning with the section
3 concerning request for accommodation --

4 THE COURT: What page are you on?

5 MR. HANNON: Page 9.

6 THE COURT: Okay.

7 MR. HANNON: So the Court has included the concept
8 in terms of that the entitlement to accommodation is
9 triggered irrespective of whether or not the employee needs
10 it in order to perform the essential functions of the job.

11 THE COURT: Yes. I think that's what you wanted,
12 right?

13 MR. HANNON: Yes. But it's not consistently
14 reflected throughout the instruction.

15 THE COURT: Okay.

16 MR. HANNON: So throughout the instruction, it sort
17 of repeatedly reads that there -- that the employee needs to
18 show a need for the accommodation.

19 THE COURT: Can you point me to a spot?

20 MR. HANNON: So the first one I have flagged here
21 is on page 9 in describing the third element of the claim, so
22 references notice of the need for that accommodation. And
23 that's -- that phrase --

24 THE COURT: Put on notice of that -- of that
25 request for accommodation?

1 MR. HANNON: I think really the concept that we're
2 driving at is entitlement, that an employee who has a
3 disability and there's an accommodation available that will
4 either allow them to perform an essential function or will
5 alleviate the stress burden, et cetera, that that employee is
6 entitled to it. So --

7 THE COURT: Well, actually, that's not actually
8 quite -- as a complete statement of law, that's incorrect.

9 MR. HANNON: Okay.

10 THE COURT: Right? Because it can't be an undue
11 burden. You're not entitled to an accommodation that would
12 be an undue burden, and you didn't use the word "reasonable,"
13 right? So an accommodation that would let you do the job, if
14 you have a disability, right, and you request an
15 accommodation, you're not entitled to that accommodation
16 unless that accommodation is also reasonable and that -- and
17 they don't prove that it's an undue burden. You're entitled
18 to it, absent their proving that it's an undue burden, I
19 suppose.

20 MR. HANNON: Your Honor --

21 THE COURT: And it's the thing I'm thinking about
22 in the third -- what I was thinking about here is this. And
23 one way to deal with it is to identify the specific
24 accommodations that are requested, but I was leery of doing
25 that, because it seemed to me hard to precisely do it in the

1 instructions.

2 But it seems to me that one of the issues here,
3 like, that comes out of the summary judgment -- and I don't
4 quite know what you're going to argue, but that
5 accommodations are -- have to be, for purposes of this case,
6 and I understand there's certain circumstances where what I'm
7 about to say wouldn't necessarily apply, but that they have
8 to be sufficiently requested.

9 So what the third element to me was driving at was
10 just the idea that -- not a complete statement of all the
11 things that Dr. Menninger needs to prove in order to win her
12 case, right? And the third element we're not addressing the
13 first, second, and fourth. It's simply that it has to be --

14 For example, they think of an accommodation that
15 was never discussed, never raised, not considered, that's not
16 a basis for finding that accommodation wasn't brought. It
17 has to be one that was sufficiently direct and, like -- that
18 was put on notice of that accommodation. That's what I was
19 thinking about from the footnote in the summary judgment.

20 MR. HANNON: Understood. Yeah. And, again, just
21 the difficulty is the word "need" and --

22 THE COURT: I totally understand. So what if I
23 just said "to put the employer on notice of that
24 accommodation"?

25 MR. HANNON: I'm fine with that.

1 THE COURT: Okay. Are there other places that you
2 think that occurred?

3 MR. HANNON: Yes.

4 THE COURT: Can you just tell me where they are now
5 before we go on to the next?

6 MR. HANNON: Page 13 and 14.

7 THE COURT: So just on page 13, the third line
8 under element 3, "So as to put the employer on notice of that
9 accommodation"?

10 And then you say in 14? Oh, right at the top on
11 the second line, "on notice of that accommodation." Anywhere
12 else?

13 MR. HANNON: In terms of the word "need," I don't
14 see it anywhere else right now.

15 THE COURT: Okay. What else?

16 MR. WATSON: Sorry, Your Honor, it's 16 and
17 Number 4 in the summary section.

18 THE COURT: Oh, right. Thank you. 16, Number 4.
19 So I'll change it, Number 4, "so as to put PPD on notice" --
20 let me just read it.

21 "On notice of that accommodation," so it's parallel
22 to the others.

23 Okay. What else?

24 MR. HANNON: So let's go to the discussion of the
25 third element.

1 THE COURT: This is page --

2 MR. HANNON: Well, actually, so page 13, the
3 definition of what a reasonable accommodation is.

4 THE COURT: Yes.

5 MR. HANNON: So there, we -- it's being defined as
6 a modification or adjustment that would enable the plaintiff
7 to perform the essential functions of her job. So that's --
8 that's missing the other half of the concept.

9 THE COURT: Okay. So or --

10 MR. HANNON: My suggestion, Your Honor --

11 THE COURT: Yes.

12 MR. HANNON: -- would be to take this section that
13 we currently have that sort of explains that accommodations
14 are available even to those who can do their essential
15 functions.

16 THE COURT: Which section?

17 MR. WATSON: Bottom of 14, bleeding into 15.

18 MR. HANNON: So I would -- I would suggest moving
19 that up, and that way you can create sort of a shorthand
20 reference to that sort of second concept. You know, for
21 example, you can call it an equal benefit or something like
22 that just so we don't have to keep on repeating that verbiage
23 over and over again, which I think just will overcomplicate
24 the instruction.

25 THE COURT: So just move that -- you're saying just

1 move the two sentence -- the qualified individual sentence at
2 the bottom of 14 and the one that follows to right after that
3 paragraph of reasonable accommodation or --

4 MR. HANNON: So I think it goes in the definition
5 of what a reasonable accommodation is, so on 13 --

6 THE COURT: I see. Hold on one second. Let me
7 just take a look at this for a second.

8 What if I just change on 13 -- hold on.

9 Before I do it, yes, Mr. Curran?

10 MR. CURRAN: Yeah, can I be heard on this whole
11 topic, or should I wait?

12 THE COURT: Sure.

13 MR. CURRAN: Okay. So the concept that's expressed
14 on -- at the bottom of 14 over to 15, I know that was
15 something you mentioned the other day that you were
16 considering working into the instructions. To me, I mean,
17 that seems broader than the law, as I understand it.

18 You know, I understand that there's a reference in
19 the regulations --

20 THE COURT: What do you propose? Putting aside how
21 we do it in 13 or 14 on the -- like, the concept -- so what I
22 understand Mr. Hannon to be saying is, Judge, I'm fine with
23 the expression of the concept on page 14 and 15, but I just
24 think there's some tension with the way it's expressed in 14
25 and 15, given that in 13, it doesn't include that part of the

1 concept, so they don't mirror each other, and so square them
2 up in some way or other.

3 Is that fair, Mr. Hannon?

4 MR. HANNON: It is.

5 MR. CURRAN: My concern is with the concept that's
6 discussed on 14 and 15.

7 THE COURT: Right. So what do you say about the
8 concept?

9 MR. CURRAN: So the concern is that I think it's
10 broad, to the extent it's saying --

11 THE COURT: What do you propose it say?

12 MR. CURRAN: -- stress or difficulties or other
13 disadvantages.

14 I think, you know, the regulations also have
15 benefits and privileges of employment, which the EEOC's
16 enforcement guidance refers to --

17 THE COURT: Well, so, like, make it hypothetical.
18 You have an employee. One of -- one function of the
19 employee's job is to give speeches at 500-person town hall
20 meetings, presentations -- not necessarily the whole
21 presentation, like if it's an hour-long meeting, but they're
22 going to speak at some portion of it, some meaningful portion
23 of it, right? And let's just say that's an essential
24 function of their job.

25 And so the employee says, "I -- I've been doing

1 that fine," everyone's rated the person fine, there's no
2 issue with that; and they say, "But I have -- I have a social
3 anxiety disorder, general anxiety, and I would like a
4 reasonable accommodation. I can continue doing this, but the
5 way I do this now is I take Valium," or whatever medication,
6 "and that has some issues and concerns, and I'd rather not
7 take medication, and so I want an accommodation. I can do my
8 job, as is, without this accommodation. I can keep doing
9 what I'm doing. But I would like an accommodation because it
10 would make my job less stressful. The accommodation I want
11 is I want a surrogate to speak."

12 Okay. So putting aside -- let's assume that the
13 surrogate is reasonable in the sense that it doesn't pose an
14 undue burden on the company. They can do it. It doesn't
15 significantly limit the essential function in a material way.
16 Is the person -- the company could do it out of grace, right?

17 MR. CURRAN: Right. I mean, should they do it? I
18 think they should. Would I advised them to do it? Yes. I
19 don't think they're required to do it by the law.

20 THE COURT: I see. So you don't think in that
21 situation --

22 And you think they would be in that situation,
23 Mr. Hannon, required to do it?

24 MR. HANNON: I do, yeah. And my colleague,
25 Mr. Watson, has provided me some authority on that. And one

1 would be *Bell v. O'Reilly Auto Enterprises, LLC*. It's a
2 First Circuit 2020 case for federal law, and then under
3 Massachusetts --

4 THE COURT: What does *Bell* say? Just read me the
5 relevant part.

6 MR. HANNON: "The district court erred here when it
7 instructed the jury that, for a disabled employee to make a
8 failure to accommodate claim he must demonstrate that he
9 needed an accommodation to perform the essential functions of
10 his job."

11 MR. CURRAN: I'm not disagreeing with that. I
12 think you also have to work at the concept of benefits and
13 privileges of employment. So, for example, if an employee
14 can't access the cafeteria, but they can still perform the
15 essential functions of their job, you know, the employer has
16 an obligation to --

17 THE COURT: To make that available in some way. So
18 that's a benefit of the job. I understand. But here we're
19 not talking about --

20 MR. CURRAN: Right. That's why I'm saying it's not
21 that case.

22 So I think that the First Circuit principle that's
23 articulated there is correct. I think that --

24 THE COURT: But there, they use -- oh, you think
25 they limited it to benefits?

1 MR. CURRAN: So what they're saying there was it
2 was error to say it can only be related to the essential
3 functions, which I think is correct. But to say that -- to
4 go beyond that and say you have to -- anything that reduces
5 stress in the job, I don't think is what the law says.

6 THE COURT: I guess the question is what -- if I
7 include this concept, that's -- I think it makes -- well --

8 MR. HANNON: Can I get to the other case?

9 THE COURT: What did you say?

10 MR. HANNON: Can I get to the other case I was
11 going to mention?

12 THE COURT: Yeah.

13 MR. HANNON: So *Ocean Spray*, that's the SJC case,
14 and that spells this out in a bit more sort of helpful
15 detail.

16 And it notes there -- it specifies that in that
17 case, the individual -- reading here -- "Because of his
18 handicap and the unmitigated condition of his work
19 environment, Reposa took significantly longer to do his
20 repair work and worked under considerable stress that posed a
21 specific and significant risk to his cardiac status.

22 "In these circumstances, Reposa was entitled to
23 request accommodation, and his employer was obligated to
24 engage in the interactive process."

25 THE COURT: I guess that gets to one of the other

1 points I was thinking about, is what is the level -- like --
2 stress is sort of a huge range, right? You could have tiny
3 little bits of stress and you could have huge amounts of
4 stress and anxiety.

5 And I'm not sure that the employer's -- a
6 reasonable accommodation, I wouldn't think, is a modification
7 or work adjustment to the work environment that relieves any
8 conceivable stress suffered by a person who is disabled from
9 their disability related to their work.

10 I would think there's some quantum, and I guess the
11 question is if -- I included the concept because I thought it
12 was correct and -- but -- and I see the tension. I agree.
13 It makes sense to say something.

14 What I was thinking was saying is, in A, would
15 enable the plaintiff to perform the essential functions of
16 her job, or -- and then the question is the other way, but to
17 relieve or -- is it just to alleviate the added stress,
18 difficulties, and other disadvantages, like I said?

19 MR. HANNON: I think you got it right.

20 MR. CURRAN: To me, I think, you know, the
21 hesitation Your Honor was expressing a minute ago about
22 there's got to be some level of stress, at least, I mean,
23 just any amount of stress, I don't think that's what the
24 *Ocean Spray* case was saying, at least as represented by
25 Mr. Hannon.

1 THE COURT: Hold on.

2 So --

3 MR. CURRAN: And you know, the other thing about
4 the *Ocean Spray* case, at least as represented by Mr. Hannon,
5 is that what triggered the need for an interactive dialogue
6 in that case was -- was finding out about this. It wasn't as
7 if they had to actually provide that accommodation.

8 THE COURT: Just give me one moment.

9 Okay. So I'm going to come back to that concept
10 here in just a minute, Mr. Curran.

11 MR. CURRAN: Okay.

12 THE COURT: So what I'm inclined to do at the
13 moment is to say, in (a), "would enable the plaintiff to
14 perform the essential functions of her job," just as it has
15 it on page 13, "or relieve the added stress, difficulties,
16 and other disadvantages a disabled employee may suffer in
17 performing their work." That covers the concept on page 13
18 you wanted.

19 Then on page 14, "a qualified individual is
20 entitled to a reasonable accommodation even if they are able
21 to perform the essential" -- well, then do I even need this
22 definition here?

23 MR. HANNON: I -- I think to -- rather than try to
24 jam everything in, I think the better approach is on 13 --

25 THE COURT: Yeah.

1 MR. HANNON: -- you have the first sentence, "A
2 reasonable accommodation is a modification or adjustment, the
3 manner in which a job is performed," period. And then I
4 think you could -- you could introduce the concept from the
5 following page, you know, that a qualified individual is
6 entitled to an accommodation either, one, if it allows -- if
7 it would enable them to perform an essential function of
8 their job; or, two, if it would --

9 THE COURT: Relieve the --

10 MR. HANNON: -- blah, blah, blah.

11 THE COURT: But the whole -- so put a period and
12 then say, "A qualified individual is somebody who can do the
13 job with a reasonable accommodation that would enable them to
14 perform it, or if the reasonable accommodation would
15 alleviate the added stress, difficulties," what have you,
16 "and the reasonable accommodations must also be feasible for
17 the employer to provide under the circumstances."

18 MR. HANNON: I think just stretching out, right,
19 rather than trying to jam everything into a single sentence,
20 I think, would be easier.

21 THE COURT: Yes, but you're saying basically just
22 move the whole qualified individual.

23 MR. HANNON: Yeah.

24 THE COURT: Okay. I see what you're saying. That
25 might make more sense.

1 And then -- okay. So then if I'm going to say
2 that, Mr. Curran, what do you say I should say about what
3 quantum? Or do either of you have a suggestion about that?

4 MR. CURRAN: "Significant stress"?

5 THE COURT: What do you say to that?

6 MR. HANNON: I don't think that's right.

7 THE COURT: What do you propose?

8 MR. HANNON: I think you got it right the first
9 time.

10 THE COURT: Any stress?

11 MR. HANNON: But keep in mind, it's only some
12 additional stress caused by the disability. So we're not
13 talking about --

14 THE COURT: I understand. Not stress performance.

15 MR. HANNON: Right.

16 THE COURT: But so any stress --

17 MR. HANNON: Specifically tied to the disability.

18 THE COURT: But then any amount?

19 MR. HANNON: Right, because the idea is we get on
20 equal footing, right? I've got a disability, and he doesn't.
21 But because of my disability, there's something that makes my
22 job harder. I'm entitled to equal footing.

23 THE COURT: Okay. Your objection is noted. I
24 won't play with the paragraph while you sit here, but you get
25 the general idea about how I'm going to do it and --

1 MR. CURRAN: Could I address the modifications that
2 you were discussing before about eliminating the phrase "the
3 need"?

4 THE COURT: Of course.

5 MR. CURRAN: Okay. So I think there has to be some
6 nexus between the notice and the accommodation, right? Like,
7 you can't -- there has to be a nexus between the
8 accommodation and whatever it is that the person needs it
9 for, whether it's for -- to help to do an essential function
10 or to -- to alleviate stress or whatever, right? Like, you
11 can't just --

12 THE COURT: Right. But I think -- unless I'm
13 missing it, that the third element where that "need" word
14 came up, the point of that is you can't -- you have -- in the
15 context of this case, the accommodations and issues are the
16 ones that were requested. You can't -- like, Mr. Hannon
17 can't stand up and say, "You know what?" -- he's a creative
18 guy -- and say, "You know, here's another accommodation that
19 they could have done."

20 And the jury might think, "Oh, that accommodation
21 would be reasonable and meet all the elements." It's too
22 late for that.

23 Like -- and so the point of the third element is
24 simply that there was a request for accommodation and the
25 request was sufficiently direct and specific that PPD knew of

1 that request, that accommodation request. The fact that
2 the -- the requested accommodation, assuming they find -- I
3 mean, I would be surprised if they didn't -- if they came to
4 the conclusion that no accommodations were requested in this
5 case, but -- and that's not really, I don't think, your
6 position, but --

7 MR. CURRAN: No, there isn't. But there are a
8 number of things the jury might think were a request for
9 accommodation, but there was never any linking of that
10 articulation of "I need more specificity from you,
11 Mr. St. John." There was no linking of that to her
12 disability.

13 So I --

14 THE COURT: Well, but it says in the fourth
15 element, "The accommodations Dr. Menninger requested was
16 reasonable in that it was feasible for PPD to provide under
17 the circumstances and would have enabled Dr. Menninger to
18 perform the essential functions of her job." And --

19 MR. CURRAN: Where is that, Your Honor? I'm sorry.

20 THE COURT: On page 9, where I list the elements of
21 the first claim.

22 MR. CURRAN: Yes. No, I agree with that. I think
23 the problem that crops up is that, when you're eliminating
24 the word "the need," for example, on page 16, in the
25 fourth -- summary of claim 1, fourth question, did

1 Dr. Menninger prove by a preponderance of the evidence that
2 she had made a request for an accommodation that was
3 sufficiently direct and specific so as to put PPD on
4 notice -- now it's going to say -- on notice of that
5 accommodation.

6 There's no nexus required by that question to --

7 THE COURT: Hold on. Let me look.

8 I think two things about that. One is that, in
9 order on the summary, the -- to find that -- to answer
10 question 5 yes, they find by preponderance of the evidence
11 that one or more of the accommodations was reasonable, for it
12 to be reasonable, it has to either enable her to perform the
13 essential functions of her job, or it has to relieve added
14 stress.

15 MR. CURRAN: I think that's true, but I think that
16 the request has to also be linked to that, doesn't it?

17 THE COURT: I don't know what you mean.

18 MR. CURRAN: I think the request for the
19 accommodation -- in order to sufficiently request the
20 accommodation, it has to be linked to the need for a relief
21 from stress or essential function.

22 THE COURT: I'm not sure -- suppose she requests
23 that she wants a blue -- a blue -- she wants like a blue
24 laptop and like -- and she says, "I'm -- I have the social
25 anxiety disability, agoraphobia, and generalized anxiety

1 disorder disability, and I can't do my job unless you give me
2 a blue laptop."

3 MR. CURRAN: That would be linking that to the
4 disability.

5 MR. HANNON: I think that's right, Judge. If I
6 just ask for a blue laptop and don't give any indication of
7 why the blue laptop --

8 THE COURT: All right. I'm fine. So what do you
9 want me to say?

10 MR. HANNON: I don't know, but --

11 THE COURT: I mean, I agree, but I would have
12 thought the linking comes in then, okay. That, like, either
13 it's not reasonable or even if it is reasonable you could
14 provide a blue laptop, it doesn't -- like, you don't need it
15 to perform the essential functions of your job. But I'm
16 happy to -- I don't -- I agree that -- I guess I agree that
17 the thing you request, in the end, you have to prove,
18 plaintiff has to prove, that it would either enable her to do
19 an essential function of her job or relieve the added stress
20 and I --

21 MR. HANNON: I think -- sorry to cut you off.

22 THE COURT: No. Go.

23 MR. HANNON: I think his point is that it has to --
24 that the request has to put them on notice that the request
25 is somehow linked to the disability.

1 THE COURT: I see. Is that what you're saying?

2 MR. CURRAN: Yeah. That's what I'm trying to say.

3 In fact, Mr. Hannon -- Dr. Hannon said it much more
4 articulately than I did. But, yeah, I mean, I think there
5 has to be a link between -- in order to put the employer on
6 notice that this is a request for an accomodation --

7 THE COURT: So what if we said to put the employer
8 on notice of --

9 MR. CURRAN: I think "the need for" is okay, and I
10 think maybe your concern about that was that suggests it's
11 needed for essential functions; is that right? And that's
12 too narrow?

13 So maybe the need -- and not to make it longer than
14 it is -- I know you want it to be shorter, but the need for
15 that accommodation in order to perform the essential
16 functions of the job, or to relieve stress, or alleviate
17 stress, or whatever the rest of that phrase was.

18 THE COURT: What if we just said -- put employer on
19 notice of that accommodation because of the disability? Or
20 the -- that accommodation and that it is requested because of
21 the disability? Right? That's really the issue?

22 MR. HANNON: That does it for me, Judge. I think
23 that's accurate.

24 MR. CURRAN: I think -- I think that's okay,
25 Your Honor.

1 THE COURT: All right. I'll change that in the
2 third element on page 9, so it will read: "So as to put the
3 employer on notice of that accommodation and that it is
4 requested because of the disability."

5 And then I'll change it to square with that on
6 page 13. It will just be the same. And on page -- carry
7 over on 14 and in the summary question 4.

8 MR. CURRAN: I think that's right, Your Honor.

9 THE COURT: Okay. Fine.

10 So back to the -- we resolved the -- and -- all
11 right. The second thing you resolve, which is the square on
12 page 13 and 16 -- I'm sorry, not -- 13 and 14. I did that.
13 Your objection is noted.

14 What else do you have, Mr. Hannon?

15 MR. HANNON: One thing -- so on page 14 -- sorry --
16 first, on page 13, just the phrase, "on the face of things."

17 THE COURT: Where are you?

18 MR. HANNON: So --

19 THE COURT: Page 13?

20 MR. HANNON: Yeah, so page 13, the section we were
21 just in, the -- B, "is feasible for the employer to provide
22 under the circumstances, at least on the face of things."

23 THE COURT: You want to add at least on --

24 MR. HANNON: Yeah, the "at least on the face of
25 things" is the -- is the phrase from the case law, and I

1 think it's important in terms of informing --

2 THE COURT: Do you disagree, Mr. Hannon -- I mean,
3 Mr. Curran?

4 MR. CURRAN: No, I don't, Your Honor.

5 THE COURT: All right. "At least on the face of
6 things." Okay.

7 MR. WATSON: And the case law, Your Honor, was
8 Reed v. --

9 THE COURT: Which page?

10 MR. HANNON: He's already ruled in our favor on
11 that. So no need to give him case law.

12 MR. WATSON: Sorry.

13 THE COURT: No problem. You don't want to snatch
14 defeat from the jaws of victory.

15 MR. HANNON: Exactly right. So turning to page 14,
16 the one beginning "fourth, Dr. Menninger must prove."

17 THE COURT: I'm sorry I just -- oh, okay. Yes.
18 Sorry. Go ahead. I see where you are.

19 MR. HANNON: "Under the circumstances," and we'd
20 ask that it again be "at least on the face of things."

21 THE COURT: "At least on the face of things."
22 What else?

23 MR. HANNON: Did we address that -- on page 14,
24 under element 4, we need to have both concepts, both the
25 essential functions and relieve stress?

1 THE COURT: I was going to move that back to -- the
2 whole qualified individual would be back on what is a
3 reasonable accommodation.

4 MR. HANNON: My reference is on page 14, the
5 paragraph that begins "fourth, Dr. Menninger must prove."

6 THE COURT: Oh, I see.

7 MR. HANNON: It's really just a conforming edit.
8 We just need to make sure we catch all the spots --

9 THE COURT: I'll do something to conform --

10 MR. HANNON: -- that's there. And, again, I would
11 suggest considering some kind of a shorthand.

12 THE COURT: Yes.

13 MR. HANNON: Yeah, and just to note, there's a
14 similar conforming edit is needed in the summary of the
15 elements on page 9. That same issue appears there. It just
16 makes reference to performing the essential functions of the
17 job.

18 THE COURT: All right. Okay. And question 3.

19 All right. What else?

20 MR. HANNON: The statement on page 14 that the
21 accommodation is not reasonable if it requires changing an
22 essential function of the job or shifting any of the
23 functions. I believe that's an incorrect statement of the
24 law.

25 And we had a specific -- in our proposed jury

1 instruction with respect to identifying examples of what
2 constitutes a reasonable accommodation, we had included two,
3 which -- one of which is drawn --

4 THE COURT: What page? What instruction are you
5 on?

6 MR. HANNON: I'm looking at -- in page --

7 THE COURT: I mean, in your proposal.

8 MR. HANNON: What proposal is this?

9 MR. WATSON: Oh. The plaintiff's proposal --

10 THE COURT: What do you want me to say there,
11 either way?

12 MR. HANNON: Well, I think it's an incorrect
13 statement of the law that it's not reasonable if it requires
14 changing, because the regulations specifically provide that a
15 reasonable accommodation includes modifying when and how an
16 essential job function is performed.

17 THE COURT: Okay. So you just want me to delete
18 the word "changing"?

19 MR. HANNON: Yes.

20 THE COURT: All right. I'll eliminate that.

21 MR. HANNON: And then -- yeah. Yes.

22 And then --

23 Where are these in the instruction? Where do we
24 add them?

25 MR. WATSON: In our 13.

1 MR. HANNON: I know. Where are they in the draft
2 instructions?

3 MR. WATSON: Oh. In this paragraph on 14.

4 MR. HANNON: Oh, okay. Yeah. So then the
5 paragraph above on page 14, the one that begins, "depending
6 on the circumstances" --

7 THE COURT: Uh-huh.

8 MR. HANNON: It provides a number of examples. I
9 think two examples were left out. One is one I just
10 referenced, "modifying when or how an essential job function
11 is performed." And that's taken from the regs.

12 THE COURT: All right. I'll add that.

13 MR. HANNON: And then there's another one,
14 "Altering, reassigning, or eliminating marginal or
15 nonessential job functions."

16 THE COURT: Read that again?

17 MR. HANNON: "Altering, reassigning, or eliminating
18 marginal or nonessential job functions."

19 THE COURT: "Altering" --

20 MR. HANNON: -- "reassigning, or eliminating
21 marginal or nonessential job functions."

22 THE COURT: All right. I don't see why I
23 shouldn't -- I'll add those two things.

24 MR. HANNON: And this -- I'm sorry. There's one
25 more here.

1 THE COURT: Uh-huh.

2 MR. HANNON: This is all in your proposed
3 Instruction Number 13. It includes the provision of
4 qualified readers or interpreters and that actually comes
5 from the statute.

6 THE COURT: I'll add that as well. Do you really
7 want "interpreters"?

8 MR. HANNON: We don't need interpreters, Your
9 Honor.

10 THE COURT: Okay.

11 MR. CURRAN: Your Honor, I'm a little concerned
12 about that just because I think -- I mean, the language
13 "readers" there doesn't refer to the type of reader that
14 Dr. Menninger was requesting, like, someone to read for her,
15 like, read what she was going to say. I think it -- my
16 understanding of what the regulations is referring to is
17 having someone read to you stuff that you can't read
18 yourself.

19 THE COURT: It may be that the statute meant that,
20 but I think this is a paragraph that's giving them examples
21 of what a -- it might include.

22 So I certainly think a -- providing someone, not a
23 reader for a person who might have been what they were
24 envisioning in statute, assuming that a close reading of the
25 statute, that's what -- it was limited that way.

1 But it seems to me that a person who, under --
2 depending on the circumstances and the essential functions of
3 the job, having someone else read things in a sense that she
4 was asking for a speaker might be a reasonable accommodation.
5 It wouldn't necessarily be a reasonable accommodation.

6 MR. CURRAN: Yeah, I'm not saying that it would be,
7 I'm just saying that if it's in the instructions, and the
8 jury might read that as being, oh, well, that must be what's
9 required.

10 THE COURT: Well, no. I think they won't read it
11 that way because it says, depending on the circumstances, a
12 reasonable accommodation might include these things and -- I
13 could add, potentially, a sentence at the end whether or not
14 something is a reasonable accommodation depends upon, you
15 know, a determination considering all the relevant facts and
16 circumstances.

17 MR. CURRAN: That might be helpful, Your Honor.

18 THE COURT: Do you object to that?

19 MR. HANNON: I don't.

20 MR. CURRAN: Would it be okay to add "interpreter,"
21 just to give it some context?

22 THE COURT: Sure. I'll add it if you want.

23 MR. CURRAN: Thanks.

24 THE COURT: Okay. What else do you have,
25 Mr. Hannon?

1 MR. HANNON: So I think the next is -- well,
2 actually, in -- on page 17, in terms of spelling out the
3 elements, the courts include an element specifying knowledge,
4 and that strikes me as being subsumed in the fourth element.

5 And I think my only -- my only quibble with it -- I
6 mean, it's -- aside from -- I'm not -- I'm not quite clear
7 why it's there, but just in terms of spelling out what the --
8 well, I'll just end there. I just don't think it's -- I
9 don't think it's needed as an extra element. I think if the
10 jury finds they did it in whole, or in part, because of her
11 disability, then they had knowledge of her disability.

12 I take that back. Maybe -- maybe what I really
13 want --

14 THE COURT: It doesn't really seem like in this
15 case -- like, I do think they have to know.

16 MR. HANNON: Right.

17 THE COURT: This isn't -- in this case, I think,
18 but I'll see what you all argue, there doesn't seem to be any
19 dispute that Dr. Menninger sent the emails she sent on
20 January 12th, and it was received by Mr. Mekerri and passed
21 on to Chad St. John; and that before then, she hadn't
22 notified anyone and that she wasn't regarded as having a
23 disability before then; and after that, it was expressly
24 clear.

25 So it does seem like they need to know. In this

1 case, it just seems crystal clear, but --

2 MR. HANNON: Although, if they don't find -- they
3 could -- they could find regarded as, right? So --

4 THE COURT: Probably not before January 12th.

5 MR. HANNON: Correct. Right. But in terms of
6 alleged anxiety disorder --

7 THE COURT: Do you want me to say --

8 MR. HANNON: Dr. Menninger --

9 THE COURT: -- that they knew that she had --

10 MR. HANNON: Had a disability.

11 Well, no, I don't think that quite strikes it right
12 either.

13 I think the problem with it, it sort of -- you
14 know, they don't -- what if they're not sure, right? What if
15 they're not sure if she actually has it or not?

16 THE COURT: Which "they"?

17 MR. HANNON: What's that?

18 THE COURT: Which "they"?

19 MR. HANNON: PPD.

20 THE COURT: What if the jury is not sure if PPD --

21 MR. HANNON: Or to put it, the jury find that PPD
22 is not sure, right? So this is -- this is saying that PPD
23 knew that Dr. Menninger had an alleged anxiety disorder.

24 THE COURT: What do you say?

25 MR. CURRAN: How about "knew or regarded her as

1 having an alleged anxiety disorder"?

2 THE COURT: How about that?

3 MR. HANNON: What about "PPD had knowledge of
4 Dr. Menninger's" -- "Dr. Menninger's alleged anxiety
5 disorder"?

6 I think that captures the --

7 THE COURT: Say that again?

8 MR. HANNON: "Had knowledge of."

9 THE COURT: That PPD --

10 MR. HANNON: Had knowledge of, Dr. Menninger's
11 alleged anxiety disorder. That would really address my
12 concern.

13 THE COURT: You're okay with that, Mr. Curran?

14 MR. CURRAN: I'm sorry. So the change is from
15 PPD --

16 THE COURT: "That PPD had knowledge of
17 Dr. Menninger's alleged anxiety disorder at the time it took
18 the alleged adverse action against her."

19 MR. CURRAN: Yeah, that's fine, Your Honor.

20 THE COURT: And then I'd make a conforming change
21 on page 18 to element 3, and I would make another conforming
22 change on page 22 to paragraph -- question 4.

23 Anything else?

24 MR. HANNON: Two more things, Judge. On page 18,
25 under the fourth element --

1 THE COURT: Yep.

2 MR. HANNON: -- the first paragraph of that
3 section, the paragraph beginning, "fourth, Dr. Menninger must
4 prove," the sentence that Dr. Menninger alleges that
5 Mekerri's February 6, 2018 email -- I think that's too
6 narrow.

7 Our request is that -- is that the Court not
8 attempt to define specifically what the -- what the adverse
9 actions are, that -- you know, to just instruct the jury what
10 it takes to constitute an adverse employment action and let
11 them determine whether or not one exists, rather than try to
12 sort of constrain their analysis, which I think requires
13 some -- a lot of wordsmithing.

14 If the Court's not inclined to take that approach
15 and leave it to the jury and the Court wants to constrain
16 them in some regard, then I have some alternative proposed
17 language with respect to that.

18 THE COURT: What would that be?

19 MR. HANNON: That would be "Dr. Menninger alleges
20 that PPD's creation of new goals and expectations for her
21 role as executive director was an adverse employment action
22 taken because of her disability."

23 THE COURT: What do you say?

24 MR. CURRAN: I like it better the way you have it
25 here, Your Honor. I mean, that's consistent with the summary

1 judgment ruling, as well.

2 THE COURT: Read that back again, Mr. Hannon.

3 MR. HANNON: Yes. "Dr. Menninger alleges that
4 PPD's creation of new goals and expectations for her role as
5 executive director was an adverse employment action taken
6 because of her disability."

7 THE COURT: That seems fair, because the goals --
8 that wasn't -- that's not seeking to put into the case
9 something I eliminated on summary judgment. I don't think I
10 said at summary judgment that there are no other conceivable
11 adverse actions. I -- there were the ones that were put out
12 and that seems to me there's evidence from which they could
13 make their own decision about goals.

14 And -- so -- hold on. Read that back again. So,
15 "Dr. Menninger alleges that" --

16 MR. HANNON: "PPD's creation of new goals and
17 expectations" --

18 THE COURT: "PPD's creation of new goals and
19 expectations" --

20 MR. HANNON: -- "for her role as executive
21 director" --

22 THE COURT: -- "for her role as executive
23 director" --

24 MR. HANNON: -- and then continuing on what you
25 had, "was an adverse employment action taken because of her

1 disability."

2 THE COURT: Okay. What else?

3 MR. HANNON: In the next paragraph, there's a
4 statement that "adverse employment action is one that,
5 standing alone, actually causes damage, tangible or
6 intangible, to an employee."

7 That's taken from a First Circuit decision that
8 said that it wasn't error to give it in that particular case.
9 I don't think it's a helpful statement of the law. I think
10 it's confusing. I don't know what it means. I don't think
11 it's going to be helpful to the jury.

12 I think what it -- what it seems to suggest is that
13 if -- if two separate actions combined constitute an adverse
14 employment action -- well, rather, that the two actions
15 combined can't constitute an adverse employment action, that
16 you -- it has to be one discrete act, one time only, and
17 that -- and that thing in the whole -- in the whole --

18 THE COURT: Are you objecting to the word "standing
19 alone" or to another part? And what are you proposing?

20 MR. HANNON: Yeah, I think the word "damages" is
21 misleading, as well.

22 THE COURT: What do you want me to say?

23 MR. HANNON: I -- I would take that sentence out.
24 And you give an example on the next page of a schedule
25 change -- right? -- that, of a schedule change of someone

1 whose a parent, whose a young parent of school-aged children,
2 that --

3 THE COURT: What do you say, Mr. Curran?

4 MR. CURRAN: I mean, I think the definition there
5 is helpful and I think it's a correct statement of the law,
6 so I'd be inclined to leave it in.

7 THE COURT: I'm going to think about that. I'm not
8 sure that -- I'm not worried that it's an incorrect statement
9 of the law, but it may not be necessary or helpful. So let
10 me -- I'll think about that.

11 What else, Mr. Hannon?

12 MR. HANNON: In the next page, on page 19, the
13 second line, the right-hand side begins, "Rather, an employer
14 takes" material -- "materially adverse action against an
15 employee only if it" -- the "only if it" is an incorrect
16 statement of the law.

17 I think the quote that appears here is taken from a
18 First Circuit case, which notes that typically an adverse
19 action is these two examples. But I don't think it's an
20 accurate statement of the law to say that it has to be one of
21 these two. And, in fact, I think the example below regarding
22 the young parent is inconsistent with that.

23 THE COURT: So what if I just say "against an
24 employee when"?

25 MR. HANNON: I would --

1 THE COURT: Or you're saying, "Typically when"?

2 MR. HANNON: Or --

3 THE COURT: "Rather, an employer takes a material
4 adverse action against an employee typically when it" --

5 MR. HANNON: Right.

6 MR. CURRAN: That's fine.

7 THE COURT: Fine. Okay. Next?

8 MR. HANNON: On page 19 -- I want to make sure that
9 my proposal here is -- so my ask here is on page 19 and sort
10 of giving these examples, I think there are -- there are
11 three more examples that the First Circuit has blessed. One
12 is disadvantageous assignments. Another is unwarranted
13 negative job evaluations.

14 THE COURT: Is this in one of your instructions
15 that I can look at?

16 MR. HANNON: I don't -- no? It's not.

17 THE COURT: Okay. So you want me to add -- after 1
18 and 2 -- 3, 4, and 5? Is that what you're saying?

19 MR. HANNON: No. So I think this would go in the
20 paragraph that begins, "For an employment action to be
21 adverse," and then the second sentence is, "However" --

22 THE COURT: An assignment -- right.

23 MR. HANNON: And then so somewhere in there, adding
24 a sentence, you know, "so to" or -- or just having a list
25 there, an assignment of more difficult job responsibilities.

1 So it could be, "However, an assignment of more difficult job
2 responsibilities, disadvantageous assignments, unwarranted
3 negative job evaluations, and toleration of harassment by
4 other employees."

5 THE COURT: "Disadvantageous assignments" -- what's
6 the next?

7 MR. HANNON: "Unwarranted negative job
8 evaluations."

9 THE COURT: Next?

10 MR. HANNON: "Toleration of harassment by other
11 employees."

12 THE COURT: Okay. All right. Right there.
13 What else?

14 MR. HANNON: Well, we'd ask also on 19, when you
15 say "more difficult job responsibilities," we'd ask that that
16 be changed to "responsibilities or expectations."

17 THE COURT: I think it's enough.
18 Next?

19 MR. HANNON: On page -- there's a -- where am I
20 here? -- does that bring us to pretext? Yeah, okay.

21 So the next issue is page 20 here at the bottom
22 that the Court's proposed sort of *McConnell Douglas* burden
23 shifting --

24 THE COURT: Yeah. What do you have to say to it?

25 MR. HANNON: We object to that. We think the

1 strong authority noting that that's not -- that's not an
2 appropriate instruction. It's not helpful to the jury. It
3 distracts the jury from the -- from the proper analysis,
4 which is really looking at the elements of the claim.

5 I also think it's not a fit here, you know, given
6 that this is not -- you know, this is not really an instance
7 where they're claiming they did things for proper reasons.
8 They're more so claiming they didn't do the things we allege.
9 So it's not an analytical fit anyhow.

10 THE COURT: What do you say, Mr. Curran?

11 MR. CURRAN: I think we are saying we did things,
12 like, for example, you know, sending Dr. Menninger's emails
13 about quality control issues, you know, asking -- asking her
14 to change her goals. I think that, you know, our whole
15 argument for that as to why that's, you know -- A, it's not
16 discriminatory or retaliatory; and, B, there's legitimate
17 business purpose for it. I do think it's helpful.

18 THE COURT: I think -- I'm not sure I -- to be
19 candid with you, I took this from what the defendants
20 proposed. It was something they were interested in and I
21 wanted to spark some discussion from all of you.

22 I think it's a little bit too tracking of *McDonnell*
23 *Douglas* to be helpful to the jury. I do think that this
24 is -- to me, this is the right place. It's about causation,
25 and the causation, really, question is why did they do what

1 they did? And that seems to be a critical question and one
2 of the critical questions in this case for the jury.

3 There really isn't a dispute, for example, that
4 they didn't accommodate Dr. Menninger on 2, 3, and 4, or that
5 she did request some sort of accommodation on 2, 3, and 4.

6 And so something about -- I'm inclined to revise
7 this in some way, something like that they need to think
8 about what the reason is, and if they determine it's the true
9 reason, it's -- they have to think about what -- without
10 being quite as prescriptive as this is, something about what
11 is the reason and what they can infer if they decide reason
12 is incorrect if -- to be shorter. I think that's what I
13 might do, but not right in front of you, and then you'll look
14 at it.

15 MR. HANNON: So just a couple of comments on that.
16 So even sort of a *McDonnell Douglas* version of this, a couple
17 of things to guard against. One is, I think, as sort of
18 currently drafted, it gives the incorrect impression that
19 pretext analysis is the only way of inferring --

20 THE COURT: I'm not -- I'm going to try to put it
21 more in vein of, like, you know, in thinking about -- you
22 know, I'm not sure how to -- I'll have to read it after
23 lunch, but thinking about this to, you know, think about what
24 is the reason, and if it's a stated reason, if -- and have
25 they proven if the stated reason is not true and what was the

1 reason, you know, and if their reason that they advanced
2 isn't true, you can infer -- or what you can infer from that.
3 Something like that, more in a general way, but sort of
4 apropos of the prior paragraph, like timing.

5 You can consider these things, there's some things
6 to consider, and it depends on what you do with them.

7 MR. HANNON: Yep. And there's one more thought.
8 In doing that, obviously, you know, making clear that there
9 may be multiple reasons for an action and they may have one
10 legitimate reason, and they may have other illegitimate
11 reasons. So it's not a matter of just looking at --

12 THE COURT: Right.

13 MR. HANNON: -- one reason alone.

14 THE COURT: Okay. What else?

15 MR. CURRAN: Could I just point out something on
16 page 20?

17 THE COURT: Yes.

18 MR. CURRAN: Just a typo. So it looks like that
19 last sentence that carries over to 21, it says
20 "Dr. Menninger."

21 MR. HANNON: Yeah.

22 MR. CURRAN: I think that should be "PPD."

23 THE COURT: As of -- "PPD has only the burden of
24 stating"?

25 MR. CURRAN: (Nods head.)

1 THE COURT: Yeah, okay.

2 MR. HANNON: And just a little bit higher up, so on
3 page 20, in the section about Massachusetts law --

4 THE COURT: Yes.

5 MR. HANNON: We would just ask a sentence just
6 noting that it need not be the only cause. We say that with
7 respect to federal law, but that -- that's not entirely clear
8 under Massachusetts law, as stated here, so I think the
9 sentence -- "need not be the only cause."

10 THE COURT: Okay.

11 MR. HANNON: Turning to --

12 THE COURT: We have to move quickly, because I have
13 a two o'clock hearing and I need to break for lunch, too.

14 MR. HANNON: So in the retaliation claim, so
15 similarly as before, the top of 24, the Court's proposed sort
16 of spelling out specifically what the materially adverse
17 actions are --

18 THE COURT: Yes.

19 MR. HANNON: -- and I have the same position as in
20 the prior section, but -- but this one has an extra wrinkle,
21 which is, as the Court notes later on in this instruction the
22 jury is allowed to look at these things cumulatively.

23 THE COURT: Yeah.

24 MR. HANNON: So spelling them out as you look at
25 each of these individually to assess with this one thing --

1 THE COURT: What do you want it to say?

2 MR. HANNON: To not identify what the materially
3 adverse actions are, to simply instruct the jury on what
4 the -- what the standard is in determining if they took a
5 materially adverse action and then let the jury decide if --
6 if they did so.

7 THE COURT: Why not do that?

8 MR. CURRAN: My turn? Okay. Great.

9 THE COURT: Uh-huh. Why not do that as to what he
10 said?

11 MR. CURRAN: Oh, I'm sorry.

12 THE COURT: No problem. He's saying on top on
13 page 24, just eliminate the sentence, "Dr. Menninger alleges
14 three adverse actions."

15 Essentially that's what you're saying.

16 MR. HANNON: I'm sorry, Your Honor?

17 THE COURT: That's what you're saying, Mr. Hannon,
18 just eliminate on top of --

19 MR. HANNON: Correct.

20 THE COURT: Like, just to prove material adverse
21 action and then delete the rest of that.

22 MR. CURRAN: I mean, I think that comes from your
23 summary judgment --

24 THE COURT: No, I understand. It does.

25 MR. CURRAN: Yeah, and so we think it's --

1 THE COURT: What are the other -- I guess, it comes
2 back to the same thing as the other one. Like, there's one I
3 did throw out at summary judgment.

4 MR. HANNON: What was that?

5 THE COURT: Which one?

6 MR. HANNON: I don't recall.

7 THE COURT: I know I did. I can't remember right
8 at the --

9 MR. HANNON: I'm pretty sure you did, too.

10 MS. MANDEL: The performance review.

11 THE COURT: The performance review.

12 MR. HANNON: Yeah. And then if -- If the concern
13 is we don't want the jury drawing that inference, then you
14 can instruct them on that.

15 THE COURT: Well, it's double. One is a very
16 unlikely concern as to you, which is I wouldn't want you to
17 argue that. I wouldn't think you would do that.

18 But the other is -- right? -- the jury shouldn't?

19 MR. HANNON: Right.

20 THE COURT: So what's your proposal?

21 MR. HANNON: My proposal remains just to -- just to
22 leave it as it is. I don't think there's any risk of the
23 jury doing that. If -- if that's what you need to tackle,
24 then, you know, giving an instruction that, you know, there
25 is -- there is insufficient evidence to -- you know, to find

1 that it was -- that that was an act of retaliation, that
2 would be an accurate statement of the law and what the Court
3 found at summary judgment.

4 THE COURT: I'll think about that.

5 What's -- what else? Anything else?

6 MR. HANNON: So just -- there needs to be a
7 conforming edit towards the bottom of 24. There's a
8 reference there that she meets the burden if she meets any of
9 the one, three -- the one, two, three --

10 THE COURT: Oh, if I change that? Yeah.

11 MR. HANNON: Yeah.

12 On 25, there's a typo in the summary of claim 3, it
13 says, in element 1, it says "that she that she."

14 THE COURT: Oh, yes. Thank you.

15 MR. HANNON: In the description of back pay and the
16 potential elements of that, we'd ask that the jury be
17 instructed that they can consider lost equity, as well.

18 THE COURT: What about that?

19 MR. CURRAN: I just think that there's -- that
20 would be pretty tremendously confusing for the jury, because
21 I don't think there's been evidence presented as to how they
22 would go about considering the equity --

23 MR. HANNON: That, Your Honor --

24 MR. CURRAN: -- and how that could be calculated.

25 MR. HANNON: On that, Your Honor, there is an

1 exhibit that's in evidence that does provide a calculation.
2 It provides -- it essentially provides the estimate that PPD
3 provided to her at the time that she got the equity. So we
4 don't -- we don't need to prove damages with --

5 THE COURT: I think I'll include that there, just
6 adding to the list "lost equity." And this is in the first
7 paragraph.

8 MR. CURRAN: Could you note our objection to that,
9 Your Honor?

10 THE COURT: Yes. Anything else?

11 MR. HANNON: Your Honor, paragraph 29, just the --

12 THE COURT: Page 29?

13 MR. HANNON: Sorry, page 29. Thank you, Judge.
14 I'm hungry, too.

15 Top of 29, the list -- this isn't a big deal, but I
16 would -- I'm not sure that that really makes a lot of logical
17 sense in terms of the way those are laid out. I would
18 suggest making the fourth one first, keeping the second one
19 second, then putting the first one third, striking the third
20 one. I think that makes it actually read with some -- some
21 more clarity.

22 But more of a suggestion than anything else.

23 THE COURT: Okay. I'll look at that.

24 MR. HANNON: Yeah, so we had -- in Instruction
25 Number 32, we had a request. Part of that request was --

1 this was our proposed Instruction Number 32.

2 THE COURT: Yes.

3 MR. HANNON: We asked the Court to instruct the
4 jury that you may award back pay if you find that PPD's
5 discriminatory or retaliatory conduct caused Dr. Menninger to
6 be able unable to work.

7 I think that that concept is sort of implicit in
8 the Court's instructions, but I think that's a useful
9 instruction and just sort of fills a bit of an analytical gap
10 that might otherwise exist.

11 THE COURT: I think it says that in the first
12 sentence, "would have received but for their discriminatory
13 retaliatory conduct."

14 MR. HANNON: Yeah, again, I think it's implicit.
15 What we've asked is a bit more explicit in terms of the
16 causal connection, making clear that if the --

17 THE COURT: Yours is more like, though, you opened
18 the door, right? That says, if this case, you may award; if
19 you don't find that, you can't award. That would be
20 implicit. It opens the door, but then it doesn't expressly
21 say what they could award.

22 I'm thinking, if they get to damages, they've found
23 that the question is something, right? There's been a
24 liability finding if they're reading this.

25 MR. HANNON: Yep.

1 THE COURT: And so then what are the things they
2 can give? They can give the things that are caused by or
3 because of the discriminatory retaliatory conduct.

4 MR. HANNON: Yeah, but I think specifically the
5 point we're looking at is that if -- if the causal chain is
6 they engage in discrimination or retaliation, that that --
7 that that causes her to be unable to work, then they're
8 allowed to --

9 THE COURT: What do you say, Mr. Curran?

10 MR. CURRAN: I mean, I think it's already included
11 within the instruction, as it's, you know, written. So I
12 don't think this is needed.

13 THE COURT: I'll think about that.

14 Okay. Anything else, Mr. Hannon?

15 MR. HANNON: I mentioned this issue earlier,
16 Your Honor, regarding collateral source rule.

17 THE COURT: Yes.

18 MR. HANNON: And, again, I think the point is
19 someone has to decide -- we have a proposed Instruction
20 Number 35, would have the jury decide whether or not to --

21 THE COURT: Right. What do you say about that?

22 MR. CURRAN: So I think there's a couple of
23 problems with this. First --

24 THE COURT: As a general proposition, though,
25 first, before we get to the specifics.

1 MR. CURRAN: I mean, I think that the collateral
2 source rule can apply to some sorts of -- some kinds of
3 payments.

4 THE COURT: So payments here are the Unum and the
5 Social Security. I guess the question is just can I give it
6 to the jury. It doesn't really explain it to them, but
7 presumably it's, like, for them to decide?

8 MR. HANNON: Right. But they're going to decide,
9 they need to be given --

10 THE COURT: Some instructions. So I guess the
11 question is do you agree it should go to the jury?

12 MR. CURRAN: I agree; I don't agree with this
13 instruction, though.

14 THE COURT: Okay. So the jury should decide
15 whether to count those things or not. Again, assuming they
16 reach damages or are awarding her the -- you all agree that
17 the jury should make the decision as to whether to deduct for
18 the Unum and/or Social Security disability payments? That's
19 my understanding of both your positions right now, unless you
20 tell me otherwise.

21 MR. CURRAN: I don't think they can consider the
22 short-term disability or the long-term disability.

23 THE COURT: Okay. So -- but he didn't factor that
24 in, your guy.

25 MR. HANNON: He factored in the short-term, not the

1 long-term.

2 THE COURT: You want me to say Instruction
3 Number 35 -- what do you want me to say?

4 MR. CURRAN: Some version of this that I would --
5 I'm not sure exactly how to phrase it. I think that the
6 concepts that are missing from this are first that they would
7 have to be -- in order to get the Social Security disability
8 benefits included in, you know, our -- taken out --

9 THE COURT: What if I just put another heading
10 right before emotional stress damages: Collateral source
11 rule, you -- something like this: "You have heard testimony
12 that -- you've heard testimony that Dr. Menninger received
13 short-term disability benefits, long-term disability
14 benefits, and Social Security disability benefits.

15 "You may decide whether to deduct from any front or
16 back pay damage awards you make. The payments -- one or more
17 of these categories of payments. In deciding whether to make
18 such deduction, you should be aware of a principle called the
19 'collateral source rule,' which is a wrongdoer's liability to
20 an injured person is not ordinarily to be reduced by the
21 amount of compensation received by an injured person from
22 collateral sources such as insurance or Social Security
23 benefits.

24 "Applying the rule means that the plaintiff might
25 receive a double recovery and -- but you -- if you find that

1 there are countervailing circumstances that make it unjust to
2 apply this rule, you may decline to -- you may not apply --
3 you can determine not to apply it and you can make the
4 deductions."

5 MR. CURRAN: I think the Social Security disability
6 payments to be a collateral source, there has to be a showing
7 of causation from the actions by us and her disability.

8 THE COURT: For it to be a collateral source that's
9 been deducted?

10 MR. CURRAN: Yes.

11 THE COURT: Do you all even want to submit this to
12 the jury? Do you want me to just say -- like, I'm not sure
13 what your position is. Do you want them to deduct it or not?

14 MR. CURRAN: I do want them to deduct it.

15 MR. HANNON: I don't want them to deduct it.

16 THE COURT: That, I understand.

17 Then my understanding of the general law is that
18 that they could deduct it if they find countervailing
19 circumstances, but the ordinary, like, default would be that
20 they don't deduct it. How much -- what beyond that do you
21 want me to say to them?

22 MR. CURRAN: I think that that's -- I think that's
23 right. I think that's -- I don't think we need anything
24 beyond that.

25 THE COURT: All right. I'll say, You've heard this

1 testimony. There's a thing this thing called the collateral
2 source. Ordinarily, these are considered collateral source
3 payments; and, ordinarily, you don't deduct them from the
4 amount of front or back pay that you find, that you award to
5 the plaintiff, unless you find countervailing circumstances
6 that would make it unjust to do so.

7 But the mere fact that she might recover double is
8 not alone itself ordinarily enough to justify deducting.

9 MR. HANNON: Sounds good to me.

10 THE COURT: Okay. Next?

11 MR. HANNON: I think just two last bits. For
12 punitive damages, we had requested an instruction advising
13 the jury they may award punitive damages even without
14 awarding compensatory damages.

15 THE COURT: What's your view on that, Mr. Curran?

16 MR. CURRAN: I think that the law is that there has
17 to be compensatory damages in order for --

18 THE COURT: So my understanding of the law is that,
19 in Section 1983 cases, there doesn't -- there does not have
20 to be an award of compensatory damages in order to award
21 punitive damages; but there is an older First Circuit case
22 that has not been overruled as far as I can tell, *Kerr*, which
23 seems to say in other cases that it might be required to get
24 compensatory damages in order to get punitives.

25 And my thought was to just not say anything about

1 it, just instruct them, and they'll consider and decide. And
2 then if we could -- if you want to press the legal issue that
3 they needed -- I personally think it's highly unlikely in
4 this case that you're going to get punitive damages without
5 any compensatory damages. In fact, I'd be close to shocked.

6 MR. HANNON: Say no more, Judge. Let's go get
7 lunch.

8 But -- what else do we have? Yeah, no. I'm fine
9 with that.

10 We had requested -- sorry. I'm backtracking, but
11 this is the very end of it, Judge. Our requested Instruction
12 Number 27, we had, "You may also" -- this goes in the
13 causation section -- "You may also infer a causal link from
14 evidence that a pattern of discriminatory or retaliatory
15 conduct began soon after the protected activity and only
16 culminated later in actual adverse action."

17 THE COURT: I think that's mostly covered. I'll
18 think about that.

19 MR. HANNON: Okay. And then the last, last, last
20 thing, I messed up earlier. The first thing we looked at
21 regarding need for accommodation, that phrasing you had --

22 THE COURT: Yeah.

23 MR. HANNON: -- that was the right phrasing. We
24 shouldn't change it, and I was wrong to suggest otherwise. I
25 think the language that we came up with actually misstates

1 the --

2 THE COURT: So you want me just to go back to "put
3 the employer on notice of the need for that accommodation"?

4 MR. HANNON: I think that's fine, because then
5 later on you explain exactly, when the need arises --

6 THE COURT: Do you have any --

7 MR. CURRAN: Yeah.

8 THE COURT: Fine. Then I'll undo the conforming
9 ones.

10 MR. HANNON: Jury slip too?

11 THE COURT: Yeah, do you have anything on the
12 verdict slips?

13 MR. HANNON: Just a couple of things. One is that,
14 for emotional distress damages, there's some recent case law
15 that says that, in order to do interest, we need to have the
16 jury apportion punitive damages -- rather, emotional stress
17 damages up till now and then emotional distress damages in
18 the future, because the emotional distress damages up till
19 now are going to be subject to prejudgment interest; and if
20 we don't have them apportioned, then there's no way to figure
21 out how much of those get the interest.

22 THE COURT: Okay. So you want me to do 4(c) as,
23 like -- in between 4(c) and 4(d) another question,
24 "What percent of this do you find attributable to emotional
25 distress she suffered up to and including today?"

1 MR. HANNON: I would suggest just doing it the same
2 way you do back pay and front pay, so emotional distress up
3 till now, emotional distress in the future.

4 THE COURT: Okay. Okay. I'll do that.

5 MR. HANNON: And then the verdict form says
6 emotional distress in the near future, and I don't think
7 limiting it to the near future is --

8 THE COURT: Okay. So "Enter below the amount of
9 emotional distress damages, if any, that she proved by a
10 preponderance that she suffered up to today because of PPD's
11 disability discrimination," and then a separate question,
12 "Enter below the amount of damages for emotional distress, if
13 any, that Dr. Menninger proved by the preponderance of the
14 evidence that she's reasonably likely to suffer in the
15 future" --

16 MR. HANNON: Correct.

17 THE COURT: -- "because of" -- yeah. Okay. Fine.
18 How much do you have?

19 MR. CURRAN: Sorry. Not a lot.

20 First is on page 12.

21 THE COURT: Yep.

22 MR. CURRAN: There's a paragraph in the middle of
23 the page there --

24 THE COURT: Yes.

25 MR. CURRAN: -- "if an employer has a concern." We

1 think that's an instruction for a case where there hasn't
2 been any request for an accommodation, or a claim of
3 disability, but the employee appears to be unable to perform
4 their job, and so the employer can then, you know -- can then
5 ask -- you know, ask for a certification or something of that
6 kind.

7 I mean, that's -- and this is one of the ones they
8 requested. And the cases that they cited for that, that was
9 a situation. I mean --

10 THE COURT: It seems like it's a correct statement
11 of the law that, like, you could have asked for -- that PPD
12 could have asked for a certification.

13 MR. CURRAN: Right. But, I mean, if we do that,
14 we're at risk of, you know, violating the ADA, which isn't
15 included in this instruction either. I mean, if we ask for a
16 certification and it turns out that we were wrong to do that,
17 because you're not allowed to just go around asking people
18 for certifications.

19 THE COURT: No. The time to ask for the
20 certification would have been after she says she can do the
21 job.

22 MR. CURRAN: After she said --

23 THE COURT: She says -- I mean, why wouldn't it be
24 that, like, in late February, they have their meeting and
25 then you can say -- I mean, it seems like that was within

1 your ability to ask for. That's what you're thinking about,
2 right, Mr. Hannon?

3 MR. HANNON: Yes.

4 MR. CURRAN: So at that point, we have this -- you
5 know, a note from the doctor saying she can't do --

6 THE COURT: Well, it doesn't expressly have the
7 sentence, "She cannot do her job," right?

8 MR. CURRAN: No, it doesn't say she can't do her
9 job. It says these are the things that are required for her
10 to do her job, for her to do these aspects of her job.

11 THE COURT: How would it violate the ADA to ask
12 for, at that point, a clarification or a medical
13 certification? I'm not saying you have to do that, but --

14 MR. CURRAN: I mean there's a risk, I mean, if it's
15 found to be unjustified. I mean, I think, you know, to sort
16 of state that the employer always has an obligation to -- and
17 I understand here it's not saying obligation, but I'm
18 concerned that the jury could read it that way.

19 THE COURT: Well, what do you want me to say
20 countervailing it?

21 MR. CURRAN: So if the Court is inclined to keep
22 the instruction, then we would ask that it say, "In addition,
23 however, the law does not" -- and I can write this up and
24 give it to you, but I can also read it -- "However, the law
25 does not require an employer to make such a request under

1 these circumstances."

2 Also, "the law allows an employee who disagrees
3 with her medical provider that certain accommodations are
4 necessary to perform certain functions of her job, or who
5 believes that her employer has misapprehended her medical
6 provider's request for accommodations to ask her medical
7 provider, or another medical provider, to submit a further
8 certification or a clarification."

9 THE COURT: What do you think about that?

10 MR. HANNON: I think it's all misleading,
11 particularly the phrasing around "other." There was -- there
12 was never any -- any certification --

13 THE COURT: We're going to pause on this, because
14 this is a little bit more complicated.

15 Just run through, without detail, what else you
16 have?

17 I think we'll have to pause.

18 MR. CURRAN: Punitive damages, we'd ask that the
19 Court not provide that instruction. We don't think that
20 there's been sufficient evidence to support that.

21 And, then, one small thing, on page 24, the top of
22 the page, under -- there's a paragraph that begins "Second,"
23 and then there's a list. And Number 2 --

24 THE COURT: Yeah.

25 MR. CURRAN: So "PPD excluded her from the hiring

1 and recruiting decisions," comma, and we just ask that you
2 add "which she alleges was a core component," because these
3 are --

4 THE COURT: I see. If I leave it, I'll add that.
5 Okay.

6 MR. CURRAN: That was it.

7 THE COURT: Okay. As to punitives, let me -- do
8 you have any response on punitives?

9 MR. HANNON: We believe there's sufficient evidence
10 on that, Judge.

11 THE COURT: All right. I'll think about that.

12 As to the medical question, I think I need to stop
13 and have lunch and have a two o'clock hearing. So why
14 don't --

15 You haven't heard more from them, have you,
16 Kellyann, about the two o'clock?

17 THE DEPUTY CLERK: No.

18 THE COURT: So the two o'clock, I don't quite know
19 how long it's going to last. It's a sentencing. If it were
20 just a sentencing, it would be 30 to 45 minutes, I'm just
21 thinking out loud, but he's trying to withdraw his guilty
22 plea, so it could be an evidentiary hearing. It could be --
23 why don't you come at 2:45, and I'll talk to you about that
24 one issue and then -- then I'll revise the instructions and
25 issue them later.

1 You don't have anything on the form? The verdict
2 form?

3 MR. CURRAN: I'm sorry?

4 THE COURT: Nothing on the verdict form?

5 MR. CURRAN: Oh. No. Nothing, Your Honor.

6 THE COURT: Okay. Great. I'll see you at 2:45.
7 Thanks.

8 (Court in recess at 1:32 p.m.

9 and court reconvened at 2:46 p.m.)

10 THE DEPUTY CLERK: The United States District Court
11 for the District of Massachusetts is now in session, the
12 Honorable Leo T. Sorokin presiding.

13 THE COURT: So one issue left to talk about, just
14 to turn back to. I want to find that page, Mr. Curran. This
15 is on page 12. That's the paragraph that was left to talk
16 about.

17 MR. CURRAN: Yes.

18 THE COURT: So start over as to this. So one
19 request is that you'd like me to take it out. Putting that
20 aside, I'll think about that, but I think that's unlikely.

21 The second alternative is you'd like me to adjust
22 it, add language, or change it.

23 So tell me -- start again. I know you said before,
24 but tell me again what you want to do there.

25 MR. CURRAN: Yeah. So what we'd like to add, if

1 it's going to stay in, would be the following: I'll try to
2 read it slowly, "However, the law does not require" --

3 THE COURT: Should this be at the end of the
4 paragraph, or somewhere else?

5 MR. CURRAN: I think it should be at the end of the
6 paragraph.

7 THE COURT: Okay. Go ahead.

8 MR. CURRAN: All right. "However, the law does not
9 require an employer to make such a request under those
10 circumstances. Also, the law allows an employee who
11 disagrees with her medical provider that certain
12 accommodations are necessary to perform certain functions of
13 her job, or who believes that her employer has misapprehended
14 her medical provider's request for accommodations, to ask for
15 her medical provider, or another medical provider, to submit
16 a further certification or a clarification."

17 THE COURT: Okay. What do you say about the
18 concepts and the words, Mr. Hannon?

19 MR. HANNON: I'm sorry?

20 THE COURT: What do you say about -- there's a
21 concept here that they want and then there's the words,
22 right?

23 MR. HANNON: Yup.

24 THE COURT: And do you have different views on the
25 two or the same.

1 MR. HANNON: I do have different views. I don't --
2 I don't think that there's any -- well, in terms of what the
3 law permits an employer -- an employee to do, I don't see
4 anything here that prompts that -- that instruction. It's
5 stating an obvious -- an obvious fact. And, you know, that
6 the employee can provide their employer any information that
7 they want, I don't think that's a principle of law. I think
8 it's a -- again, it's just a -- it's just an obvious fact
9 that she's free to tell them whatever she wants to.

10 And to the extent that the Court thinks that
11 there's some benefit to instructing the jury on that obvious
12 issue, it shouldn't be phrased in a way to in any way sort of
13 suggest what the evidence in this case is.

14 So, for example, I think Mr. Curran's phrasing
15 references if the -- if they disagree with information
16 provided by their medical provider. I don't think there's
17 any evidence here that she disagreed with her -- with her
18 medical provider.

19 So if there has to be any comment, I would suggest
20 that the -- that the comment be more general and just the
21 extent of, you know, the law does not impose any limits on,
22 you know, what information the employee may provide to their
23 employer concerning, you know, their disability or need for
24 accommodation, something like that. I think that would
25 accurately describe it because there are some limits on what

1 the employer can do. There are no limits in terms of what an
2 employee can provide.

3 MR. CURRAN: But I think the juror is not going to
4 know that, you know, that there are limits on --

5 THE COURT: Hold on one sec.

6 MR. CURRAN: Sure.

7 THE COURT: What if I just added to the end, "The
8 law imposes no limits on what an employee can provide -- what
9 information an employee can provide to an employer regarding
10 an employee's disability, medical conditions, or ability to
11 perform job-related functions?

12 MR. HANNON: I'm fine with that.

13 MR. CURRAN: I'm fine with that, Your Honor.

14 THE COURT: Okay. I'll add that there.

15 Okay.

16 MR. HANNON: I thought of one other nit, I'm sorry,
17 over lunch.

18 THE COURT: Uh-huh.

19 MR. HANNON: So this is something that came up this
20 morning.

21 THE COURT: Yes.

22 MR. HANNON: So Mr. Curran, on his questioning of
23 Mr. Jonas, posited a hypothetical of "What if she gets a job
24 flipping burgers," in terms of front pay. I think the law
25 focuses on comparable employment in terms with respect front

1 pay. And I would just ask that that be clarified in -- I
2 think there are three spots for that clarification. So one
3 is at the bottom of 28. The second-to-last paragraph ends
4 with other similar employment. I would request that
5 "similar" be changed to "comparable," just so there's no
6 confusion on what's being referred to there.

7 THE COURT: You don't object to that, do you,
8 Mr. Curran?

9 MR. CURRAN: I don't object. I'm not sure there's
10 much difference between "similar" and "comparable."

11 THE COURT: Well, I'm not sure, either.
12 But what else?

13 MR. HANNON: And 29 at the top -- so that's the
14 list of things to -- that the jury can consider, that the
15 concept of comparable employment needs to be included --

16 THE COURT: Earn the amount of earnings from
17 comparable employment?

18 MR. HANNON: Correct. And that would apply to
19 what's currently 3 and also what's currently 4.

20 THE COURT: Anything else?

21 MR. HANNON: That's all.

22 THE COURT: Okay. All right. I will issue a
23 revised of both documents when we're done and then you'll
24 have those.

25 And so you want 40 minutes and 5 minutes?

1 MR. HANNON: Can I do 35 and 10?

2 THE COURT: Okay. A shorter 10, but yeah. Okay.
3 And 45 for you?

4 MS. MANDEL: Yes, Your Honor.

5 THE COURT: Okay. Fine.

6 I think somewhere between 5 and 10. I'm not going
7 to pull the hook out --

8 MR. HANNON: Yup.

9 THE COURT: -- but I'm mindful of too long becomes
10 like not rebuttal and independent argument.

11 MR. HANNON: Understood.

12 THE COURT: That's what I'm concerned with.

13 Okay. And then what I'm going to do with the
14 instructions, I'll docket them, so you have them on ECF. But
15 I'm going to -- I've been thinking about this. I might have
16 referred a little bit about this, maybe in the last trial,
17 but I'm going to give part of the instructions before your
18 closing arguments. I'm going to give what amounts to -- if
19 you look at the jury instructions, everything from page 1 --
20 I'll modify the introductory paragraph, up to, on page --
21 right now, page 8, where it says elements of the claims. So
22 that first part about what is evidence, how to think about
23 evidence, credibility, I'm going to do that first. There are
24 a couple of reasons that I'm going to do that.

25 And then when you're done with your closing

1 arguments, I'll turn to my instructions starting with the
2 elements of the claims, and then say the elements, and how to
3 deliberate. I'm doing that for two reasons. Honestly, one,
4 it's rather boring, the instructions, to listen to. So it
5 breaks it up; and then number two, when they're done with
6 your closing arguments, what they really want to hear from me
7 is the elements and then I can go right into that. So that's
8 what I'm going to do.

9 Anything about that?

10 MR. HANNON: No, Your Honor.

11 THE COURT: Okay.

12 MR. CURRAN: Can I just ask one question?

13 THE COURT: Of course.

14 MR. CURRAN: So I take it you're going to charge on
15 damages? Is that --

16 THE COURT: Oh, I haven't had -- honestly, I
17 haven't spent four seconds on this case since I last saw you.
18 So I reserved on that and so -- but that's one of the things
19 that I'm going to think about. I'm going to make all the
20 changes we discussed. I'm going to make -- I'll reserve
21 on -- the ones I reserved on, I'll resolve. And then I'll
22 take care of it and I'll issue it on E CF, as soon as I'm
23 done, so you'll have it. And I'll tell you that just where
24 I'm leaning, I'm leaning to give it, not because I -- because
25 I think in --

1 Generally speaking, on these kinds of issues, it's
2 better to give things to the jury than see. If they decide
3 no punitives, then that's the end. And if they decide
4 there's punitives, I can -- then we can always engage in
5 briefing and discussion. And if I think it's improper, I can
6 take it away. It's -- punitives, of course, focus is on the
7 conduct, not the harm. Right? Because it's not the level of
8 harm that justifies punitives.

9 MR. HANNON: It's a factor.

10 THE COURT: Factor. But just to borrow example, a
11 Comcast driver could be driving down the road, he could be
12 driving perfectly reasonably and appropriately, not texting,
13 not speeding, sunny dry day, totally appropriate, and a
14 five-year-old could independently run out into the street,
15 and boom he kills them. The damages far exceeds -- like in
16 human consequence what we have here. I mean, we have a dead
17 child. But -- and that may be, under the law, a factor, but
18 it would strike me, on that set of facts, it would be
19 improper -- I would take punitives away if they were awarded
20 because there's no -- like there has to be some outrageous or
21 whatever conduct.

22 I understand that's not this case, but --

23 MR. HANNON: I was going to point out. It can also
24 mean what happens after. So if after the child is struck,
25 there's an effort to cover it up, and driving records are

1 altered and on and on and on.

2 THE COURT: Sure, there could be postevent coverup
3 and that could potentially be relevant.

4 MR. HANNON: Yeah.

5 THE COURT: So I'm mostly inclined -- but that,
6 too, is not focused primarily on harm. I'm not saying harm
7 is irrelevant. But I don't really understand the law to mean
8 that if the harm is really bad, that, alone, can justify
9 punitives. I don't see how the harm in and of itself,
10 without misconduct, could justify punitives. Because you're
11 punishing something and how can you punish if someone
12 didn't -- if they didn't do anything wrong, beyond the
13 ordinary wrong that gives rise to civil legal liability. So
14 that's why I make that point.

15 So I will - I'm not -- I haven't conclusively
16 resolved it, but that's the way I think about it. Would I --
17 if it were rewarded, is it obvious to me that I wouldn't make
18 a ruling about -- like would I entertain, seriously, a
19 motion? I would. But I don't know -- I haven't heard the
20 argument. So maybe I would view it differently after I heard
21 the argument. And so -- which isn't to say I have a view
22 about the merits of the case. I don't, really. I'm quite
23 happy that we have juries. So -- but I'm inclined, it seems
24 to me that the more prudent and better course is to give it
25 to the jury.

1 MR. HANNON: And one thing I just thought of, I
2 think you have some rulings under advisement with respect to
3 certain exhibits.

4 THE COURT: One.

5 MR. HANNON: So one of them, for example,
6 yesterday, the portion of the MCAD position statement, we had
7 offered that, the bit about they --

8 THE COURT: Yes, I remember.

9 MR. HANNON: -- had hired the interim director. So
10 then you have the other advisement. I think you have a
11 couple of their exhibits that are offered, as well, under
12 advisement.

13 MS. MANDEL: Yes, Your Honor. There are --

14 So the MCAD position statement is one.

15 THE COURT: That's Mr. Hannon's.

16 MS. MANDEL: Right. And then the ones I have
17 listed here are the letters that we used to designate them --
18 I think.

19 Is that a BO? This top one? BO, AD, and BI are
20 the ones. We just cross-referenced the transcripts with --

21 THE COURT: The only one that I'm aware of -- I'm
22 not saying there aren't others, that I recall reserving on,
23 is the one, the MCAD one that Mr. Hannon has referenced. You
24 think there are other ones that I reserved on? I guess I
25 would ask you what are those documents and are you pressing

1 that they be admitted?

2 As to yours, Mr. Hannon, the requested admitted is
3 denied, your rights are saved. It's denied, one, because I
4 think it's cumulative. We've already heard a lot of
5 testimony on it. Two, I think the time for it -- to the
6 extent it's partially impeachment of Ms. Ballweg, and so
7 insofar as that, it's with Ms. Ballweg. It's also, at the
8 time -- I see sort of its cumulative and raising side issues.
9 I'm not saying I would have ruled the same way had it come up
10 at a different point in the trial, but at a point at the very
11 end. So I see it more as a 403 issue, so for those reasons,
12 it's denied, and your rights are saved.

13 MR. HANNON: Well, the one that Your Honor just
14 ruled on, that was the only exhibit that I'm pressing that
15 was reserved, so...

16 MS. MANDEL: And I believe we had one of the
17 e-mails between Dr. Kessimian and Dr. Menninger that was --
18 we met one morning. I believe there were four e-mails and
19 one of them we reserved on, the others --

20 THE COURT: Can you show me the document?

21 MS. MANDEL: Yeah, let me --

22 THE COURT: Do you remember which document this is,
23 Mr. Hannon?

24 MR. HANNON: I do. It was an e-mail correspondence
25 between Dr. Kessimian and Dr. Menninger. The witness was

1 questioned about it. Attorney Mandel essentially kind of
2 walked her through the content of the e-mail. I don't think
3 the e-mail was ever actually offered. I think after
4 Ms. Mandel went through the content with the witness, she
5 moved on to something else. So I don't think this is
6 something that the Court actually held under advisement.

7 MS. MANDEL: Well, I believe during our morning
8 conference, our understanding was during the morning
9 conference is there were three of them we wanted to use as
10 exhibits on one, I believe the issue is whether there was
11 foundation --

12 THE COURT: Well, do you want it or not?

13 MS. MANDEL: We would like it, yes.

14 THE COURT: Okay.

15 (Counsel confers.)

16 THE COURT: E-mail Ms. Belmont the document or
17 documents, and I will --

18 Are you objecting, Mr. Hannon?

19 MR. HANNON: I am, Your Honor.

20 THE COURT: All right. I'll look at them and then
21 I'll just issue an E-order that says if they're in or they're
22 out.

23 MR. HANNON: Okay. And just for the record, I
24 think part of my objection is it wasn't offered. And if it
25 had been offered, I would like to have redirected on it, but

1 because it wasn't offered, I would --

2 THE COURT: Fine. Okay. I'll -- e-mail them so I
3 can look at them. I just don't have them fresh in my head as
4 to exactly which e-mails they were. I would like to look at
5 them and just copy Mr. Hannon on it. Send them to
6 Ms. Belmont. And as soon as you do, I'll look at them, and
7 I'll resolve it today.

8 (Court in recess at 3:04 p.m.)

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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Rachel M. Lopez

March 30, 2023

/s/ Robert W. Paschal

Rachel M. Lopez, CRR

Date

Robert W. Paschal, CRR, RMR

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